71-1040

FEB 14 1972

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No.

UNITED GAS PIPE LINE CO. AND PENNZOIL UNITED, INC.,
Petitioners

v.

LOUISIANA POWER & LIGHT CO.,
Respondent

No.

UNITED GAS PIPE LINE CO.,
Petitioner

v.

LOUISIANA POWER & LIGHT CO., ET AL.,
(FPC Opinion 606)
Respondents

PETITION OF UNITED AND PENNZOIL FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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INDEX

	Page
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statutes Involved	3
Statement	3
Curtailment Proceedings	4
District Court Proceedings	4
Court of Appeals Decision	7
Reasons for Granting the Writ	8
Conclusion	15
Appendices	
A Court of Appeals Opinion	1a
B Court of Appeals Judgment	28a
C District Court Opinion	30a
D Statutes Involved	43a
E Commission Opinions and Orders	55a
F FPC Opinion 610	91a

CITATIONS

Cases

Connecticut Light & Power Co. v. *Federal Power Commission*, 324 U.S. 515 (1945)	13
Federal Power Commission v. *Arkansas Power & Light Co.*, 330 U.S. 802, *rev'g mem.* 156 F.2d 821 (D.C. Cir. 1946)	12
Federal Power Commission v. *East Ohio Gas Co.*, 338 U.S. 464 (1950)	11
Federal Power Commission v. *Florida Power & Light Co.*, 40 U.S. L. Week 4141 (January 12, 1972)	13
Federal Power Commission v. *Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1 (1961)	11
Gulf States Utilities Company v. *FPC*, No. 71-3627 (5th Cir., filed Dec. 28, 1971)	2
International Paper Company v. *FPC*, No. 71-3531 (5th Cir., filed Dec. 15, 1971)	2
Louisiana Power & Light Company, et al v. *FPC*, No. 71-3429 (5th Cir., filed Dec. 3, 1971)	2

	Page
Marine Engineers v. *Interlake Co.*, 370 U.S. 173 (1962)	12
Mississippi Power & Light Company v. *FPC*, No. 72-1003 (5th Cir., filed Dec. 30, 1971)	2
Mississippi Valley Gas Co., et al. v. *FPC*, No. 72-1157 (5th Cir., filed January 21, 1972)	2
Monsanto Co. v. *FPC*, No. 71-1306 (D.C. Cir., filed April 26, 1971	4
Monsanto Co. v. *United Gas Pipe Line Co.*, Civ. No. 2037-71 (D.D.C., January 21, 1972)	8
Monsanto Co. v. *United Gas Pipe Line Co.*, No. 72-1093 (D.C. Cir., request for injunction filed January 31, 1972)	14
Myers v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41 (1938)	12
Panhandle Eastern Pipe Line Co. v. *Federal Power Commission*, 324 U.S. 635 (1945)	12
Panhandle Eastern Pipe Line Co. v. *Public Service Commission of Indiana*, 332 U.S. 507 (1947)	11
State of Louisiana, et al v. *FPC*, No. 72-1220 (5th Cir., filed Jan. 28, 1972)	2
Texas Gulf Sulphur Co. v. *United Gas Pipe Line Co.*, Civ. No. 2253-71 (D.D.C., January 21, 1972)	8
Texas Gulf Sulphur Co. v. *United Gas Pipe Line Co.*, No. 72-1094 (D.C. Cir., request for injunction filed January 31, 1972)	14

Statutes

Natural Gas Act	
Section 1(b), 15 U.S.C. § 717(b)	11
Section 4, 15 U.S.C. § 717c.	4
Section 5, 15 U.S.C. § 717d.	12
Section 7, 15 U.S.C. § 717f.	3, 7, 12
Section 19(b), 15 U.S.C. § 717r(b)	2, 13
28 U.S.C. § 1254(1)	2
28 U.S.C. § 1332	5

Miscellaneous

LA. CONST. art 6, § 4	10

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PETITION OF UNITED AND PENNZOIL FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

United Gas Pipe Line Company (United) and Pennzoil United, Inc. (Pennzoil) petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit and for a writ of certiorari to review opinions and orders of the Federal Power Commission (Commission) prior to judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals (App. A, *infra*, at 1a) is not yet reported. The opinion of the District Court (App. C, *infra*, at 30a) is reported at 332 F.Supp. 692. The opinions and orders of the Commission (App. E, *infra*, at 55a) are not yet reported.

JURISDICTION

The judgment of the Court of Appeals (App. B, *infra*, at 28a) was entered on January 14, 1972. The Commission Opinion Nos. 606 and 606-A (App. E., *infra*, at 55a) were issued on October 5, 1971 and December 3, 1971, respectively. Six proceedings to review those opinions are pending in the Court of Appeals;[1] United has filed timely motions to intervene in all six. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and Section 19(b) of the Natural Gas Act, 15 U.S.C. § 717r(b).

QUESTIONS PRESENTED

1. Whether, in times of shortage, the Federal Power Commission has authority under the Natural Gas Act to allocate the interstate gas supplies of an interstate pipeline as between industrial and domestic users.

2. Whether a court has jurisdiction to determine the Federal Power Commission's jurisdiction over facilities being operated by an interstate pipeline when the jurisdictional issue presented to the court is at that very time being litigated at the Commission.

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[1] The review proceedings are *Louisiana Power & Light Company, et al* v. *FPC*, No. 71-3429 (5th Cir., filed Dec. 3, 1971); *International Paper Company* v. *FPC*, No. 71-3531 (5th Cir., filed Dec. 15, 1971); *Gulf States Utilities Company* v. *FPC*, No. 71-3627 (5th Cir., filed Dec. 28, 1971); *Mississippi Power & Light Company* v. *FPC*, No. 72-1003 (5th Cir., filed Dec. 30, 1971); *Mississippi Valley Gas Co., et al* v. *FPC*, No. 72-1157 (5th Cir., filed January 21, 1972); *State of Louisiana, et al* v. *FPC*, No. 72-1220 (5th Cir., filed January 28, 1972). Nos. 71-3429, 71-3531, 71-3627, and 72-1003 were consolidated by order of the Fifth Circuit entered January 28, 1972. The Commission's motion to consolidate these four review proceedings with Nos. 72-1157 and 72-1220 was served on February 1, 1972.

STATUTES INVOLVED

The statutory provisions involved (App. D, *infra*, at 43a) are Sections 1(b), 4, 5, 7, 16 and 19(b) of the Natural Gas Act, (the Act) as amended, 15 U.S.C. §§ 717(b), 717c 717d, 717f, 717o, 717r(b) (1970).[2]

STATEMENT

United, a jurisdictional pipeline,[3] (R. 266-67, 282)[4] operates interstate gas transmission facilities in Texas, Louisiana, Alabama, Mississippi and Florida, (RP71-29 Tr. 70)[5] and through connections with other major jurisdictional pipelines (R. 282) supplies much of the gas used in the eastern half of the United States.[6] All of United's sales, service and facilities, except some of those in its Victoria and New Orleans Divisions, have been certificated by the Commission pursuant to Section 7 of the Act. (R. 284) An application to certificate all of United's uncertificated sales, service and facilities is presently pending before the Commission in *United Gas Pipe Line Co.*, FPC Docket No. CP71-89.[7] (R. 284-85)

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[2] Act of June 21, 1938, 52 Stat. 821-24, 830-31.

[3] "Jurisdicational pipeline" as used in this application means a pipeline which is subject to the jurisdiction of the Commssion as a result of the transportation or sale for resale of natural gas in interstate commerce.

[4] "R." refers to the printed appendix filed in the Court of Appeals in connection with the appeal which resulted in the judgment (App. B, *infra* at ....) which United/Pennzoil ask this Court to review.

[5] "RP 71-29 Tr." refers to the certified record filed by the Commission in the review proceedings referred to in note 1, *supra*.

[6] RP71-29 Ex. 121; RP71-29 Tr. 3318-23, 3432-34, 5522-24, 5432-36.

[7] On February 9, 1972 the Commission found that all of United's uncertificated sales, service and facilities are subject to Commission jurisdiction. *United Gas Pipe Line Co.*, FPC Docket No. CP71-89 (Opinion No. 610, February 9, 1972). (App. F, *infra*, at 91a)

Curtailment Proceedings

Anticipating that it would not have enough gas available to meet the demands of all its customers during the 1970-71 heating season (November 1, 1970 through March 31, 1971), (R. 234) United, on October 26, 1970, by a filing under Section 4 of the Act, asked the Commission to issue a declaratory order concerning United's implementation of a system-wide[8] program of curtailments of natural gas deliveries to its direct and indirect[9] industrial customers. (R. 226) United's filing was docketed as *United Gas Pipe Line Co.*, FPC Docket No. RP71-29. On December 29, 1970, pursuant to agreement of all but one of the parties,[10] the Commission allowed United to continue to implement its plan for the 1970-71 winter. (R. 230)

On February 22, 1971, United made a supplemental filing (R. 231) regarding a proposed program of curtailment of industrial gas deliveries during the summer of 1971 in order to fill storage in anticipation of domestic demands during the 1971-72 winter heating season. In response to Commission Order 431, issued in FPC Docket R-418, United later filed a proposed curtailment plan for the 1971-72 winter. (R. 241-43)

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[8] The plan covered both United's certificated service and the service in the New Orleans and Victoria Divisions for which United has applied for certificates in Docket CP71-89.

[9] United's direct industrial customers include electrical utilities, to the extent they depend on United for gas to be burned as boiler fuel for the generation of electricity for industrial use. United's indirect industrial customers are industrial users who depend on United's pipeline customers or gas distribution customers for industrial gas.

[10] Monsanto Co. appealed the 1970-71 winter settlement order to the Court of Appeals for the District of Columbia Circuit. *Monsanto Co.* v. *FPC*, No. 71-1306 (D.C. Cir., filed April 26, 1971). Briefs have been filed; argument is scheduled for March 13, 1972.

District Court Proceedings

On March 31, 1971, while the Commission was conducting hearings in the curtailment proceeding, Louisiana Power & Light Company (LPL), one of United's industrial customers and a party to both the curtailment (R. 228-29) and certificate (R. 251) proceedings, filed a collateral attack on the Commission's jurisdiction. Basing jurisdiction in the District Court on 28 U.S.C. § 1332 because of diversity of citizenship, LPL claimed the curtailment program was a breach of its industrial contracts with United and asked for an injunction to prevent United from curtailing it. (R. 14)

Upon being confronted with motions by the Commission (R. 185) and United (R. 186) to dismiss for failure to exhaust its administrative remedies in the curtailment and certificate proceedings, LPL argued that exhaustion was not required because in its view, despite the Commission's jurisdiction over interstate gas transportation, the exemption of industrial sales from Commission rate regulation precluded the exercise of any Commission jurisdiction over admittedly interstate gas deliveries for direct industrial use. With respect to deliveries to its Nine Mile Point station it further argued that, under its view of the facts,[11] the gas in United's New Orleans Division, through which deliveries are made to Nine Mile Point, is local rather than interstate and that the Commission had no curtailment jurisdiction at Nine Mile Point for this additional reason.

On June 30, 1971, after an evidentiary hearing, (R. 223-403) the District Court dismissed the suit for lack of jurisdiction, holding that the Commission proceedings were well within the Commission's jurisdiction and that LPL was

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[11] The Commission ultimately found the facts to be substantially different from what LPL contended they were. (App. F, infra at 101a-08a)

required to exhaust its administrative remedies in both proceedings. (App. C, *infra*, at 39a-40a, 41a-42a)[12]

Judge Scott acknowledged the existence of a gas shortage, both nationally and on United's system, (App. C, *infra*, at 35a) and made the following findings of fact. Delivery of LPL's full contract volumes would reduce the supply of gas available to United's other customers and proportionately affect United's curtailment to those customers. (App. C, *infra*, at 40a) There are numerous customers not parties to this suit whose interests will be affected by the Commission curtailment proceedings. (App. C, *infra*, at 34a) The Commission approved United's curtailment program for the 1970-71 winter season with the agreement of LPL. (App. C, *infra*, at 35a) As of May 27, 1971, the time of the District Court hearing, the Commission was considering the propriety of United's curtailment program for the summer injection season (April 1, 1971 through October 31, 1971) and for the 1971-72 winter. (App. C, *infra*, at 35a-36a) LPL, subject to its objection to Commission jurisdiction, is a party to the consolidated curtailment proceedings. (App. C, *infra*, at 34a, 36a) The gas delivered at LPL's Sterlington station is interstate gas. (App. C, *infra*, at 33a) Interstate gas is commingled in the system through which deliveries are made to LPL's Nine Mile Point station. (App. C, *infra*, at 33a) and proceedings are currently pending before the Commission to certificate that system. (App. C, *infra*, at 33a)

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[12] This was the second dismissal for lack of jurisdiction. Also relying on the exhaustion doctrine, Judge Dawkins first dismissed the case on April 29, 1971. (R. 187-88) On May 14, 1971 an administrative panel of the Fifth Circuit vacated the judgment of dismissal and remanded the case to Judge Dawkins for an evidentiary hearing on the jurisdictional issue and on such other preliminary issues as might be properly raised. (R. 192-96) Judge Dawkins, at the request of LPL, then recused himself and the case was reassigned to Judge Scott.

Having found these facts, the District Court concluded (App. C, *infra*, at 39a-42a) that (1) the curtailment and certificate proceedings were well within the jurisdiction of the Commission, (2) LPL had failed to prove that it would suffer irreparable harm if required to pursue its administrative remedies and (3) the Commission's expertise was necessary for the proper consideration and disposition of the issues presented in those proceedings.

Court of Appeals Decision

On January 14, 1972, the Court of Appeals reversed. Rather than confining its review to the question of exhaustion of administrative remedies, the Court of Appeals undertook to decide the merits of the jurisdictional issue presented in the Commission curtailment proceeding and the additional jurisdictional issue presented in the certificate proceeding and held against the Commission on both issues. (App. A, *infra*, at 21a, 25a)

With respect to the issue of the Commission's jurisdiction presented in the curtailment case, which by the time of the Court of Appeals decision had been decided by Commission Opinion 606, (App. E, *infra*, at 55a) the Court of Appeals acknowledged the inability of state regulatory bodies to deal with systemwide shortages (App. A, *infra*, at 17a) but held that once a direct sale is certificated pursuant to Section 7 of the Act, it may not be further regulated short of a Commission abandonment order.

The Court of Appeals' holding that the Commission has no regulatory jurisdiction over United's New Orleans division was most unusual. On the basis of an incomplete record,[13] introduced before the District Court for the limited

[13] As of the time of the District Court hearing the CP71-89 record consisted of 43 pages of testimony and 15 exhibits. Formal hearings did not even begin until June 7, 1971, twelve days after the District Court hearing was concluded. When the CP71-89 record was closed at the Commission, it consisted of 1,276 pages of transcript, 63 exhibits and 10 items by reference.

purpose of showing the nature of the issue presented in the certificate proceedings, (R. 246-59, 260) it proceeded to make its own determination of factual issues which had never been passed upon by either the Commission or the District Court and concluded that the amount of interstate gas being commingled in that division on an annual basis was not large enough to subject the sales, service and facilities to Commission jurisdiction. (App. A, *infra*, at 25a) The District Court finding that the Commission's expertise was necessary for the proper consideration of these factual issues was disregarded. (App. A, *infra*, at 23a-24a)

REASONS FOR GRANTING THE WRIT

These cases present an issue of vital importance to the millions of individuals who depend on gas to heat their homes and to the institutions (schools, hospitals and other public facilities) who are equally dependent on this limited energy source. The queston is also critical to the regulated interstate pipelines, who transport the gas, and to the customers of those pipelines, who use the gas or sell it to the ultimate consumer. The issue, simply stated is, who will decide the service priorities when the supplies are not sufficient to meet the total demands of all.

The Fifth Circuit decision, which is in direct conflict with a District Court decision in another Circuit,[14] and which conflicts in principle with the decisions of this Court, deprives the Commission of jurisdiction over scarce supplies of admittedly interstate gas and at the same time leaves the industry without an orderly procedure for prorating the inadequate gas supplies of jurisdictional pipelines. Unless this Court expeditiously resolves the question, United may be required at any moment to follow the orders

[14] *Texas Gulf Sulphur Co.* v. *United Gas Pipe Line Co.*, Civ. No. 2253-71 (D.D.C., January 21, 1972); *Monsanto Co.* v. *United Gas Pipe Line Co.*, Civ. No. 2037-71 (D.D.C., January 21, 1972).

of various federal courts[15] to allocate its inadequate supplies in a manner at odds with the curtailment program sanctioned by the Commission, with the result that domestic users may well be short of gas before this winter is over, and the ability of interstate pipelines to store gas for anticipated domestic use during the 1972-73 winter heating season may be seriously jeopardized.

Because the Fifth Circuit judgment squarely decides the Commission's curtailment jurisdiction, despite the pendency of the review proceedings,[16] United petitions this Court to review both the judgement of the Fifth Circuit and the opinions and orders of the Commission prior to judgment of the Fifth Circuit.[17]

1. The judgment of the Fifth Circuit has a tremendous practical effect in the context of the undisputed gas shortage nationally and on United's system. By rejecting the Commission's determination (App. E, *infra*, at 59a) that it has the authority to allocate all interstate supplies on a system-wide basis among all customers, the Fifth Circuit has left it up to individual courts and state regulatory agencies to attempt to cope with the problem in the context of the varying provisions of numerous contracts between jurisdictional pipelines and their industrial customers.

The potential harm implicit in the Fifth Circuit judgment is demonstrated by the effect of the judgment on United's system operation as revealed by the record in the curtailment case.

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[15] *See* note 27, *infra*, and accompanying text.

[16] *See* note 1, *supra*.

[17] Pennzoil petitions this Court to review only the judgment of the Court of Appeals as it has not intervened in the review proceedings.

United estimated that on cold days it would be short by as much as 1.5 billion cubic feet. (RP71-29 Tr. 4107) Under United's plan a shortage of this magnitude would be dealt with by reducing direct and indirect[18] industrial deliveries (RP71-29 Ex. 123) Under the plan electrical utilities would be curtailed only to the extent that they use gas as boiler fuel for the generation of electricity for industrial use;[19] the ability of electrical utility customers like LPL to generate for domestic use is unimpaired by the plan. United's curtailment plan thus gives a higher priority to human needs than to industrial requirements, thereby taking into account the fact that large industrial users normally have the capacity to utilize alternate fuels when gas is not available whereas individual consumers normally do not have the ability to utilize alternate fuels. By curtailing industrials, United anticipated being able to avoid any curtailment of gas for domestic use this winter. (RP71-29 Tr. 4323)

Thirty seven per cent of United's total sales in 1970 were direct industrial sales. United FPC Form 2, at 514 (1970). The Fifth Circuit decision, by removing these substantial industrial volumes from Commission jurisdiction, has left them virtually unregulated and, has thereby left domestic users essentially without protection. For example, the Louisiana Public Service Commission is constitutionally prohibited from exercising any jurisdiction over any aspect of an industrial sale.[20] And no court or state commission,

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[18] *See* note 9, *supra*.

[19] *Ibid.*

[20] LA. CONST. art 6, § 4.

even if it had jurisdiction over industrial sales within its borders, would be in a position to regulate industrial curtailments on a system-wide basis. Accordingly if the Fifth Circuit decision stands, domestic users dependent on United's system could end up having to absorb the entire system shortage of 1.5 billion cubic feet on cold days the remainder of this winter, and United's ability to store gas for domestic use next winter will be seriously jeopardized.

2. The Fifth Circuit's restrictive view of the Commission's powers under the Act conflicts with the prior decisions of this Court which make clear that although Section 1(b) exempts direct sales from rate jurisdiction, it at the same time grants jurisdiction over all transportation of gas in interstate commerce and over natural gas companies engaged in such transportation. In *Panhandle Eastern Pipe Line Co.* v. *Public Service Commission of Indiana*, 332 U.S. 507 (1947) and in *Federal Power Commission* v. *Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1 (1961), this Court, stating that the Act is to be broadly read in favor of federal regulation of problems with which state regulatory commissions cannot be expected to deal, recognized this independent grant of Commission transportation jurisdiction.

This Court has also clearly recognized the independent grant of Commission jurisdiction over natural gas companies engaged in interstate transportation[21] and has held

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[21] *Federal Power Commission* v. *East Ohio Gas Co.*, 338 U.S. 464 (1950).

that in the exercise of this natural gas company jurisdiction the Commission may proceed under the Act to prevent unjust, unreasonable or preferential rules, regulations, practices or contracts of jurisdictional pipelines.[22]

Curtailment jurisdiction is an exercise of jurisdiction over transportation and over the pipeline doing the transporting. The Commission has the power by virtue of its jurisdiction over transportation and over United to deal with United's curtailment plans by proceedings under Sections 4 and 5. By reading Section 1(b) as a whole, one is thus compelled to conclude that the Commission's curtailment jurisdiction is not inconsistent with the exemption of industrial sales from rate regulation. Nor is it limited by Section 7 as the Fifth Circuit suggests.

3. The Fifth Circuit's decision of the certificate proceeding, Docket CP71-89, presents an extremely important issue involving the adjustment of the relations between the federal agencies and the federal courts. The decisions of this Court, *e.g.*, *Marine Engineers* v. *Interlake Co.*, 370 U.S. 173 (1962); *Federal Power Commission* v. *Arkansas Power & Light Co.*, 330 U.S. 802, *rev'g mem.* 156 F.2d 821 (D.C. Cir. 1946); *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41 (1938), reflect a profound concern that the administrative process not be subverted by the substitution of a court's judgment for the judgment of an agency simply because of a claim of lack of agency jurisdiction. In *Marine Engineers* this Court made clear that the need for initial agency determination of its jurisdiction is greatest when the jurisdictional issue brought before the court is in the process of litigation at the agency. 370 U.S. at 185. Disregarding these decisions, the Fifth Circuit decided an important issue of Commission jurisdiction which was not before

[22] *Panhandle Eastern Pipe Line Co.* v. *Federal Power Commission*, 324 U.S. 635 (1945).

it for review and which, although pending before the Commission in the certificate proceeding, had not then been decided by the Commission. In so doing the Fifth Circuit took an incomplete record[23] which was before it for the limited purpose of showing the nature of the issue which was pending at the Commission (R. 246-59, 260) and made factual determinations which had never been passed upon by either the Commission or the lower court. When one compares the Fifth Circuit's analysis of the facts, (App. A, *infra,* at 22a) with the subsequent Commission evaluation of a full record, (App. F, *infra,* at 101a-08a) one can quickly see why the decisions of this Court require that federal agencies be given the opportunity to make the initial determination of their jurisdiction.[24]

Additional evidence of the wisdom of allowing initial agency determination of questions of agency jurisdiction is demonstrated by the fact that in the process of evaluating the facts the Fifth Circuit also applied the wrong legal standard.[25]

Under the decisions of this Court, the Commission should have been given the initial opportunity to decide whether United's New Orleans division is subject to the Commission's jurisdiction and, if so, whether the sales, service and facilities in that division should be certificated under

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[23] *See* note 13, *supra.*

[24] The factual conclusions to be drawn from the evaluation of gas flow evidence are precisely the kind of determinations that, given the different institutional capacities of courts and agencies, should be reviewed only under the substantial evidence review procedure established by Section 19(b) of the Act. *Cf. Federal Power Commission* v. *Florida Power & Light Co.,* 40 U.S. L. Week 4141, at 4144 (January 12, 1972).

[25] When complicated questions of agency jurisdiction are litigated at the agency it is less likely that the reviewing court will be persuaded, as was the Fifth Circuit in this case, (App. A, *infra,* at 25a) to adopt theories like the *de minimis* concept discredited by this court in *Connecticut Light & Power Co.* v. *Federal Power Commission,* 324 U.S. 515, 535-36 (1945).

Section 7 of the Act. Accordingly, the District Court decision requiring LPL to exhaust its remedies in the certificate proceeding was proper.[26]

4. Expeditious consideration of this important jurisdictional issue is imperative, as the potential impact on domestic users this winter is great and as the ability of jurisdictional pipelines to fill storage fields this summer in anticipation of the 1972-73 winter heating season demands is threatened. Two requests for injunctions are now pending in the D.C. Circuit,[27] and by virtue of the Fifth Circuit's refusal to stay the mandate in this case,[28] LPL will be entitled to go to trial on its injunction request in District Court. Other industrial customers of United, seeing the advantage LPL has obtained, will also seek injunctions, thereby seriously interfering with United's ability to protect domestic users the remainder of this winter and disrupting United's curtailment program this summer. Only prompt resolution of the jurisdictional issue by this Court can prevent these serious consequences.

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[26] The District Court requirement of exhaustion in the curtailment case was also proper at the time it was entered. However, as the Commission's opinions and orders (App. E, *infra*, at 55a) were pending in the Fifth Circuit at the time of the Fifth Circuit decision and as the Fifth Circuit has clearly rejected the rationale of the Commission's decision, the Commission's opinions and orders upholding its curtailment jurisdiction are properly before this Court for review. The certificate case on the other hand, although now decided by the Commission, (App. F, *infra*, at 91a) will not be ripe for review by any court until the rehearing procedure has been exhausted at the Commission. Accordingly the certificate proceeding may not be properly reviewed by this Court at this time.

[27] Texas Gulf Sulphur and Monsanto have moved for injunctions pending their appeals from the judgments, *see* note 14, *supra*, dismissing their injunction suits. *Texas Gulf Sulphur Co.* v. *United Gas Pipe Line Co.*, No. 72-1094 (D.C. Cir., request for injunction filed January 31, 1972); *Monsanto Co.* v. *United Gas Pipe Line Co.*, No. 72-1093 (D.C. Cir., request for injunction filed January 31, 1972).

[28] On February 1, 1972 the Commission and United/Pennzoil served motions requesting stay of the Fifth Circuit mandate. Stay was denied by order of the Fifth Circuit entered February 7, 1972.

CONCLUSION

For these reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

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February 1972

APPENDIX A

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 71-2550

LOUISIANA POWER & LIGHT COMPANY,

Plaintiff-Appellant,

VERSUS

UNITED GAS PIPE LINE COMPANY, ET AL.,

Defendants-Appellees,

FEDERAL POWER COMMISSION

Intervenor.

Appeal from the United States District Court for the Western District of Louisiana

(January 14, 1972)

Before THORNBERRY, MORGAN and CLARK, Circuit Judges.

CLARK, Circuit Judge: The present nationwide shortage of natural gas generated this controversy.[1] First, we must make a construction of the Natural Gas Act[2] which will properly balance that Act's grant of jurisdictional power to the Federal Power Commission (FPC) over the trans-

[1] This is a matter we have judicially noticed as eminent; *See* Southern Louisiana Area Rate Cases v. Federal Power Commission, 428 F.2d 407 (5th Cir. 1970).

[2] 15 U.S.C.A. § 717-717w.

portation of natural gas in interstate commerce with the equally explicit Congressional directive that the Act shall not apply to so-called direct sales of gas — sales which are for consumptive use by the purchaser rather than for resale to others. This requires a determination of whether the grant of transportation jurisdiction confers a power to the FPC to now recondition certificates of public convenience and necessity it previously issued authorizing the construction and use of pipeline facilities to perform gas sales contracts between an interstate gas pipeline, United Gas Pipeline Company (United), and a utility company, Louisiana Power & Light Company (LP&L), which burns the contract gas under its boilers to generate electricity. Second, we must determine whether minor diversions of interstate gas have converted a wholly state-contained pipeline system to an interstate facility.

On preliminary motions by United and FPC, the district court dismissed LP&L's complaint seeking an injunction requiring United to perform its contracts. The dismissal was based both upon a finding that LP&L had failed to demonstrate irreparable injury and upon the legal conclusion that proceedings pending before the Federal Power Commission, concerned with the same general subject matter, were "well-within the [primary] jurisdiction of the FPC." We determine that the lower court erred; both in basing its decision on LP&L's failure to demonstrate irreparable injury at a preliminary hearing on its opponents' motions to dismiss, and in concluding that the FPC's claim of continuing certificate jurisdiction and its claim of jurisdiction over an asserted intrastate facility was free from doubt. We therefore reverse the order of dismissal and remand this action for further fact development on the issue of irreparable injury.

BACKGROUND

In 1956 LP&L entered into a twenty-year contract with United calling for the delivery of natural gas to be burned under LP&L's boilers at its Sterlington Electric Generating Station in Ouachita Parish, Louisiana. The contract contained a provision entitled "Impairment of Deliveries" which provided that in the event a shortage of gas rendered United unable to supply the full requirements of all of its customers, then gas utilities reselling gas to domestic consumers and electric utilities using gas for the generation of electricity for domestic consumption would be first supplied by United, with any remaining available gas to be prorated among its other customers.

For many years United has also contracted with LP&L to sell it natural gas for LP&L's steam electric generating use at its Nine-Mile Point Generating Station in Jefferson Parish, Louisiana. This contract also contained an impairment of deliveries clause which provided that, in the event a shortage of gas made the available supply inadequate, available gas would be ratably prorated between gas utilities purchasing gas for resale to domestic consumers, and electric utilities using gas to generate electricity for domestic consumers.

Certificates of public convenience and necessity have been issued by the FPC covering all of United's facilities used to make deliveries to LP&L's Sterlington Station.[3] Deliveries to LP&L's Nine-Mile Point Station have never been certificated, since, until recently, all of the gas delivered to this station only traveled in a pipeline system, designated the "Green System," which gathered and dis-

[3] United Gas Pipe Line Co., 3 FPC 863 (1942); United Gas Pipe Line Co., 19 FPC 31 (1957), United Gas Pipe Line Co., 33 FPC 734 (1965), United Gas Pipe Line Co., 37 FPC 399 (1967), United Gas Pipe Line Co., 38 FPC 88 (1967).

posed of gas wholly within the confines of the State of Louisiana. However, in 1970 United chose to divert 2.6% of the gas supplied under its Nine-Mile Station contract into the Green System from its interstate system, designated the "Black System."

In 1970 United petitioned FPC for declaratory approval of a curtailment plan to meet an anticipated shortage of gas during the 1970-71 winter heating season and for an indeterminate time thereafter.[4] LP&L and other direct sales customers of United intervened. In its petition for intervention, LP&L maintained that the proposed curtailment program reached both direct sale and sale for resale customers and would violate the terms in its contracts. LP&L denied that the FPC had jurisdiction to curtail direct sales contract deliveries through previously certificated transportation facilities.

United has also filed an application with the FPC to grant a certificate of public convenience and necessity to utilize the Green System pipeline facilities serving the Nine-Mile Point Station of LP&L. This proceeding bears Docket No. CP 71-89. LP&L has intervened. No decision has been rendered.

In March 1971, LP&L filed a complaint in the district court asserting jurisdiction based on diversity of citizenship. It sought and received a temporary restraining order requiring United to perform its contracts. The day following the issuance of this order, the FPC intervened in the case and the district court reversed its prior restraining order and dismissed the cause for lack of jurisdiction. After the district court refused to stay its order of dismissal a single judge and, subsequently, a panel of this Circuit, stayed the dismissal of the district court action and entered an order providing in pertinent part:

[4] Docket No. RP 71-29.

> The case is remanded to the district court for an expedited hearing on the jurisdictional issue and on such other *preliminary* issues as may properly be raised. This Court expresses no opinion on the jurisdictional issue. At such hearing counsel for the parties and the intervenor may present evidence hearing on the jurisdiction of the court and on other appropriate *preliminary* questions. The district court will make appropriate findings of fact and state its conclusions of law. (Emphasis supplied.)

We add emphasis to the above quotation to point up that we did not direct that the court hear the case on its merits at the time it held the required jurisdictional hearing.

On remand, the district court held the hearing mandated and made Findings of Fact which included the following:

> All gas delivered by United to the Sterlington and Nine-Mile Point Stations is produced in Louisiana. All deliveries of gas to the Sterlington Station are interstate gas. Deliveries of gas to the Nine-Mile Station are made through the "Green" pipeline which is located entirely within the State of Louisiana. The great bulk of the gas in the "Green" line is intrastate gas. However, some gas is dumped into the "Green" pipeline from the "Black" pipeline. This is interstate gas so there is a co-mingling of intrastate and interstate gas in the "Green" pipeline.
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> * * *
>
> LPL has alleged (Complaint Paragraph 17) that the proposed curtailment by United could ultimately effect a "black-out" or "brown-out" which, under certain circumstances, could cover an area as large as the whole State of Louisiana, or, indeed, a several-state area such

as occured during the notorious "northeast black-out" in 1965. The record is bare of any evidence to support this allegation.

The court additionally noted that LP&L has filed a registration statement with the Securities & Exchange Commission which not only did not disclose the pendency of the subject litigation as a suit which carried the potential of severe service interruptions, but also affirmatively stated that after June 1971 it expected to be able to offset any foreseeable gas curtailment by burning oil at its generating stations.

The Court concluded as a matter of law that the motions to dismiss filed by United and FPC should be granted because LP&L had failed to establish irreparable injury and therefore was not entitled to injunctive relief. It alternatively based its dismissal upon the conclusion that LP&L was required to exhaust its remedies before the FPC rather than pursuing judicial relief since: (1) LP&L had not proved the extent of possible injury which might result from the pursuit of curtailment proceedings before FPC; (2) those curtailment proceedings were well within the jurisdiction of the FPC; and (3) the expertise of the FPC was necessary for the proper consideration and disposition of the issues. All injunctive relief was vacated and the action brought by LP&L was dismissed. The present appeal arises from this action.

During the pendency of this appeal, the FPC rendered its Opinion No. 606 in United's curtailment proceedings, Docket No. RP-71-29. In this opinion the Commission concluded that it had plenary authority to allocate the gas supply of jurisdictional pipelines to *all* of the pipeline's customers, including customers who were previously certificated direct sale purchasers under long-term contracts, and

that it should make such allocations in the form of tariff orders requiring curtailments of gas deliveries to all users of natural gas which United transported in commerce. The basis of the FPC's reasoning was that its power to make such curtailments was related to its jurisdiction over transportation, and that its transportation jurisdiction "is and must be" of a *continuing* nature rather than being "insignificantly" limited to the initial grant or denial of a certificate of public convenience and necessity to construct the facilities used to make direct sales. The FPC determined that it must have jurisdiction to exert continuing control over the gas sold under such certificated direct sales in order to accord full protection to the public since state commissions could not reasonably be expected to formulate a uniformly fair plan for the apportionment of the scarce commodity. Thus, FPC asserts that the present gas shortage has created "new circumstances" giving rise to the "need" to continuously reevaluate previous certificates to make all pipeline sales fully compensatory and thereby use financial incentive to encourage exploration for and development of new natural gas supplies.

PROOF OF IRREPARABLE INJURY

Both premises for the court's jurisdictional dismissal were based (one in whole and the other in part) on the determination that LP&L had failed to carry the burden of demonstrating its potential injury. In its sworn complaint in the district court, LP&L detailed its assertions of immediate and irreparable damage. In brief paraphrase, its allegations were these. LP&L supplied the electricity it generated to 46 of 64 parishes in Louisiana and had interconnections with all other electrical utility companies in Louisiana and most of the rural electric cooperatives in that State. Through this network it served the electrical needs of numerous domestic and industrial customers, as well as governmental subdivisions. Through other intercon-

nections, it participated in an area-wide electrical grid network serving over 2,500,000 consumers, which was still further connected to power sources throughout most of the eastern part of the nation. A failure to be able to utilize the full generating capacity of the Sterlington and Nine-Mile Stations at peak demand periods could cause a wide area "black-out" or "brown-out" with damages beyond any means of calculation. It was further asserted that LP&L had relied upon United's contract when it constructed Sterlington Station, which had no full-capacity alternate source of energy for electrical generation and that, so long as United breached its contract commitment by curtailing gas deliveries, LP&L would lose electrical sales which could never be recovered because of the evanescent quality of its stock in trade, electricity, which could not be stored nor could it be delivered at any moment after the immediate demand for it had passed. The loss of such sales would be further irreparable since the fixed cost of basic generating facilities depreciated whether used or not.

The court found that the record on the preliminary hearing of the motions to dismiss for want of subject matter jurisdiction, under Fed.R.Civ.P. 12(d) was bare of any evidence to support the portion of these allegations relating to a possible "black-out" or "brown-out" of electrical power. This finding is correct; just as it is further true that the record is devoid of any evidence to support the remaining verified allegations of irreparable injury through lost sales. But, it is obvious why. At the commencement of the hearing[5] and in ruling on objections during its progress, the court made it abundantly clear that all evidence to be taken should be directed solely to the jurisdictional issue raised by the respective motions to dismiss of United and

[5] The hearing commenced with the court's announcement to *United's* counsel: "—you are the mover, so you may proceed."

FPC. Neither the defendant nor the intervenor had answered. No responsive pleadings other than these jurisdictional motions were on file. The case was not then being heard on its merits (or lack of them) as to the ultimate relief prayed for by the plaintiff.

The basic tenet of both prongs of the lower court's ruling — that LP&L had failed to demonstrate it would be harmed by any curtailment of gas deliveries under United's contract — was drawn from the examination and cross-examinations of J. M. Wyatt, a senior vice president of LP&L. On direct examination, Mr. Wyatt testified that at the time of this Rule 12(d) hearing, the Sterlington Station plant had no capability to utilize any alternate fuel other than natural gas and that the Nine-Mile Point Station was equipped to operate only one of its several units, and that unit only on an emergency basis for up to 36 hours, on No. 2 fuel oil. He further testified that after June of 1971 the company expected to have similar emergency capability to operate one unit of its Sterlington plant on such fuel oil. On cross-examination of Mr. Wyatt, counsel for the FPC brought out that registration statements filed by LP&L with the Securities and Exchange Commission contained assertions under the heading "Fuel Supply", which were inconsistent with the anticipated injuries which the complaint asserted would flow from the breach of United's contracts. Counsel for United brought out on his cross-examination of Mr. Wyatt, that LP&L had a separate natural gas supply contract term supply of 66⅔% of the present fuel energy requirement for the operation of LP&L's Nine-Mile Point station, and that another LP&L-Texaco, Inc. gas contract had been made to cover additional fuel when a new generating unit went on-stream at this plant in 1973.

After an examination of the entire record, this Court concludes that the preliminary hearing record compiled in

the court below was limited to a determination of the jurisdiction of the court vis-a-vis the jurisdiction of the FPC. The hearing had a somewhat unique procedural posture due to this Court's stay and remand for expedited disposition of the jurisdictional issue. This factor aids in making it abundantly clear that the court and the parties were proceeding on the assumption that the matter was being heard on defenses as to which the movants and not LP&L had the burden of persuasion.

This is not to say that a party moving for an injunction does not have the burden of showing irreparable injury. We only assert that the mandate of this Court remanded the cause to the district court for an expedited hearing on the jurisdictional issue and on other *preliminary* issues that were appropriate or properly raised. With no pleading challenge whatsoever to the facts stated in the complaint, and without notice of any kind to the parties that the matter was to be heard on its merits, the court improperly based its conclusions of law upon its finding of a failure by LP&L to carry a burden it did not know it was required to meet. *Cf. Nationwide Amusements* v. *Nattin,* ..... F.2d ..... (5th Cir. 1971) [No. 71-2299, 1971].

Finally, as to the procedural aspect of this matter, we hold that it was error to use the preliminary hearing proceedings on Rule 12(b) defenses to dispose of this cause on its underlying factual merits. Except in unusual circumstances, and then only after clear notice this course is improper. *See* 5 Wright and Miller, Federal Practice and Procedure § 1373; 2A J. Moore, Federal Practice ¶12.16.

Aside from the procedural problem, the lack-of-proof-of-potential-injury bases for denial of injunctive relief and for requiring exhaustion of FPC remedies cannot stand on the undisputed matters which were developed. The fact that LP&L made statements to the Securities & Exchange Com-

mission which can be read to be inconsistent with its claim that performance of United's natural gas contracts is an essential prerequisite to the operation of its plants, is a matter that could be considered if the defense of estoppel is raised or the equitable defense of unclean hands should become pertinent.[6] All we hold on this appeal is that the language of the filing posed against the sworn facts of the complaint and Wyatt's testimony would, at most, show that LP&L was guilty of misleading the investing public. If that be so, it is another lawsuit. There was no room for concluding from any fact shown in this record that LP&L had some alternate means of generating electricity except on a makeshift basis, or even on that basis, for more than a day and a half.

Of course, proof of this type could be critical if proven facts left room for conflicting inferences as to whether loss of contract gas would indeed result in injury. The Nine-Mile Point Station contract arrangement with Texaco, Inc. would similarly present a substantial question in this respect. It apparently shows the ability to obtain 2/3rds of the needed supply of natural gas for this particular station for the next two years, and an even greater percentage of its needs for those years after the additional generating unit becomes operational.

What all of this may mean as to the relationship which the amount of gas contracted to be supplied to the Sterlington and Nine-Mile Point Stations by United bears to LP&L's ability and imperative need to generate electricity both

[6] Before this court, LP&L asserts that its registration statements do not even demonstrate a lack of candor with the Securities & Exchange Commission, since LP&L was entitled to assume that its contract commitment with United would ultimately be honored. However, we expressly eschew *any* hint of a ruling on this matter. It is no more pertinent to our review than it was to the preliminary decision below.

to prevent catastrophic breakdown and irretrievable loss of sales, can only be determined by development of the evidence on the merits. What is the fuel need at each station? What are the alternate sources of energy supply? How much power can be exchanged (and at what ultimate loss or gain to LP&L) through interconnected sources? What are LP&L's usual and the peak demands? The record does not answer any of these questions, or the doubtless many more, that will play into arriving at the final answer.

In sum, we hold the district court erred in finding and concluding upon this record that LP&L had failed to establish that the breach of these contracts would not cause it immediate and irreparable injury, both because it improperly assigned the burden of proof to LP&L at this stage of the proceeding and because the record does not demonstrate that such injury is not likely to occur.

FPC JURISDICTION

The Direct Sales Exclusion vis-a-vis Continuing Certificate Jurisdiction (The Sterlington Station Issue).

The intent which motivated Congress at the time legislation was enacted must be the lode star constantly guiding the court which is required to construe their enactment. At first blush, it may seem trite to start this draft of the chart of our search for statutory meaning with so basic an axiom. But the changed circumstances of a new era are claimed in the strongest terms to have created an urgent "*need*" for the recognition of an authority to extend a granted power so deeply into an area where agency jurisdiction was expressly denied that, to paraphrase an old song, accentuating the affirmative eliminates the negative. This we cannot do. Such action does not fill in statutory interstices or resolve ambiguities in a law. It selects between competing policies which have been legislatively recognized in the same enactment and have been court-de-

clared not only to be separate subjects of regulation, but also to have "independent and equally important places in the Act." *Federal Power Commission* v. *East Ohio Gas Co.*, 338 U.S. 464, 70 S.Ct. 266, 94 L.Ed.268 *reh. denied* 339 U.S. 905 (1950).[7] Such choices of policy belong to the Congress alone. In speaking to the effect of new experiences under this very Act and to the identical problem we face, the Supreme Court plainly specified that *Congress* was the institution vested with the power to adjust the law to correct deficiencies which were not originally anticipated. *Panhandle Eastern Pipe Line Co.* v. *Public Service Commission of Indiana*, 332 U.S. 507, 522, 68 S.Ct. 190, 92 L.Ed. 128 (1947):

> With our compass oriented to legislative intent, we turn to the Act itself and the authorities which have construed it to date. In the *Panhandle Eastern* decision cited above, the Court, while recognizing the undoubted power of Congress to define the distribution of power over interstate commerce, pointed out that the Natural Gas Act created an articulate legislative program creating a comprehensive regulatory scheme in which federal power complemented, but did not usurp, the existing authority of state regulatory agencies, 332 U.S. at 520. Congress was motivated by a desire to protect consumers against exploitation at the hands of natural gas customers, *Sunray Mid-Continent Oil Co.* v. *Federal Power Commission*, 364 U.S. 137, 147, 80 S.Ct. 1392, 4 L.Ed.2d 1623 (1960), but it did not decide that this protection was to be accomplished by arrogating all control over

[7] Subsequent circuit decisions have articulated this principle by stating that while the FPC's power over transportation invests it with limited indirect control over non-jurisdictional direct sales, the grant of power and the reservation of such sales are separate aspects of regulation under the Act. *See e.g.*; United Gas Pipe Line Co. v. Federal Power Commission, 388 F.2d 385 (5th Cir. 1968); Panhandle Eastern Pipe Line Company v. Federal Power Commission, 359 F.2d 675 (8th Cir. 1966).

interstate commerce in natural gas to the federal agency. "[M]uch authority was reserved to the States." *Federal Power Commission* v. *Transcontinental Gas Pipe Line Corporation*, 365 U.S. 1, 19, 81 S.Ct. 435, 5 L.Ed.2d 377 (1961). Since a complete as well as an harmonious regulatory scheme was envisaged, an intent to leave no area of substance unregulated must also be recognized, and no "attractive gaps" should be created by judicial interpretation. *Id.* However, as Mr. Justice Black wrote in *East Ohio Gas Co.*, supra, the location and breadth of such "gaps" must be adjudged in the light of what rights were defined by court precedents which existed *prior* to the time of legislation and not those since decided or which the courts would decide today. Without such a limit, judicial action would certainly become legislation.

The coverage of the Natural Gas Act has been so succinctly and aptly described by Mr. Justice Rutledge that it would be presumptuous not to quote:

> Three things and three only Congress drew within its own regulatory power, delegated by the Act to its agent, the Federal Power Commission. These were: (1) the transportation of natural gas in interstate commerce; (2) its sale in interstate commerce for resale; and (3) natural gas companies engaged in such transportation or sale.
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> The omission of any reference to other sales, that is, to direct sales for consumptive use, in the affirmative declaration of coverage was not inadvertent. It was deliberate. For Congress made sure its intent could not be mistaken by adding the explicit prohibition that the Act "shall not apply to *any other* * * * *sale* * * *." (Emphasis added.) Those words plainly mean that the Act shall not apply to any sales other than sales "for resale for ultimate public consumption for domestic,

commercial, industrial, or any other use." Direct sales for consumptive use of whatever sort were excluded.

The line of the statute was thus clear and complete. It cut sharply and cleanly between sales for resale and direct sales for consumptive uses. No exceptions were made in either category for particular uses, quantities or otherwise.[8]

As is not uncommon when courts construe legislation over any appreciable time, subsequent decisions have made the clear "line of the statute" more and more crepuscular. One thing can be sharply discerned, the explicit prohibition of the statute denying jurisdiction over direct sales of gas for consumptive use has been consistently narrowed as courts and the FPC have increased the ambit of the jurisdictional grant over interstate transportation of such fuel. This has been done by analyses which recognized broad power in the FPC to grant certificates of public convenience and necessity in connection with extension of pipeline facilities to service direct sales outlets.

The most significant decision construing the FPC's certificate jurisdiction is *FPC* v. *Transcontinental Gas Pipe Line Corp., supra,* which was decided after Congress had amended § 7 of the Act to greatly broaden the ambit of federal power. That case pointed out that in the original Act, § 7[9] restricted certification to instances where a pipeline sought to serve an area already being served by another regulated company. In 1942 § 7 took its present form requiring certifi-

[8] Panhandle Eastern Pipeline Co. v. Public Service Commission of Indiana, *supra,* 322 U.S. at 516.

[9] 15 U.S.C.A. §717(f).

cation of every facility subject to the jurisdiction of the Commission. The amendment intended to change the certificate function, which formerly looked only to control of competition between regulated pipeline companies, to one which considered both relative end use values and price effect factors.

This extension of the certificate function obviously detracted from the direct sale exclusion, but in *Transcontinental*, the Court affirmed that direct sales remained ". . . not subject to the Commission's jurisdiction *except insofar as § 7 requires the Commission to certificate the transportation of gas pursuant to the sale.*" (Emphasis supplied.) Furthermore, in this same opinion, Chief Justice Warren avowed that § 7 powers of the FPC were limited. He observed that the Commission had sought but had not been awarded comprehensive authority over all aspects of gas conservation. His description of the power which Congress had been willing to confer on FPC was the right to exercise a *veto power* over proposed transportation. 365 U.S. at 17.

Against this background matrix of interpretive instruction, we must decide whether a new form of certificate jurisdiction never heretofore judicially recognized exists under § 7. The issue is: Does the FPC have the authority to modify or condition a certificate of public convenience and necessity issued for facilities used to make a direct sale? Or more briefly stated: Does the Commission have continuing certificate jurisdiction? FPC asserts that it does, and that it *"needs"* to have this jurisdiction to make effective what it conceives to be the full extent of its regulatory powers. We deny this assertion. Even conceding that FPC powers are as broad as it asserts, no amount of need alone can create federal agency power if Congress has not expressly or impliedly granted it. Necessity may be the mother of inven-

tion, but need must have the paternal spouse — a legislative grant — to beget agency authority.

The grant of a continuing jurisdiction over certificates already issued might well be implied from the broad powers vested over transportation under § 7. The *Transcontinental* case teaches that FPC has the power to weigh and consider the end uses of gas in order to maintain the greatest benefit from the finite supply of this wasting natural resource. It is further empowered to consider the overall effect which prices to be paid by direct sale purchasers will have on field prices for jurisdictional uses. Such far-reaching powers clearly indicate that episodic State regulation could result in less efficient control than would centralization of all control in the FPC. Considered on these factors alone, the basic rules of statutory interpretation would call for a construction favoring continuing certificate jurisdiction. But! The Act itself expressly proscribes jurisdiction over direct sales and, as to such transactions, the recognition of continuing certificate jurisdiction would do no less than abolish the Act's exception of jurisdiction over sales for consumptive use, which has an equally secure and important place in the structure of the Act.

When any initial certification proceeding is pending before it, even one involving a direct sale, the Commission can exercise a *veto power* over the proposed transaction based upon its judgment as to whether the use proposed to be made is for a valid and efficient use, and whether the price structure would have a deleterious effect in consideration of its overall regulatory scheme. However, as to a non-jurisdictional sale, this power ceases under the Act as it is presently written when the certificate is finally issued, unless and until the right to abandon certificated facilities is requested.

Not only do we fail to find any precedent for establishing a new type of FPC authority in between its § 7 (c)[10] veto power over the initial authorization to begin the use of a facility to transport natural gas in interstate commerce and § 7 (b)'s[11] requirement that FPC authorization be obtained for abandonment of such facilities,[12] we find clear authority that no such continuing control over non-jurisdictional sales exists. The rationale of our own decision in *Hunt Oil Company* v. *Federal Power Commission,* 334 F.2d 474 (5th Cir. 1964), indicates that a certificate has a permanency that is free from continuous FPC adjustment and control. In that case when we determined that the FPC had erred in refusing to permit a state public service commission to intervene in a proceeding which had resulted in the issuance of a certificate of public convenience and necessity, we not only authorized such intervention but required the FPC to set the certificate aside and start the proceedings anew. If there

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[10] In pertinent part, this section provides:

> (c) No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefore, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations: . . . ."

[11] (b) No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment.

[12] *See* United Gas Pipe Line Company v. Federal Power Commission, 385 U.S. 83, 87 S.Ct. 265, 17 L.Ed.2d 181 (1966).

was a continuing revisory power in the Commission, the vacation of the certificate would have been unnecessary since the intervenor's rights could have been accommodated by adjusting the certificate.

Even stronger authority is found in the precedents from other circuits. In *Granite City Steel Company* v. *Federal Power Commission,* 320 F.2d 711 (D.C. Cir. 1963), that court set aside an FPC order attempting to reallocate gas supplies between direct and resale sale customers. Although this proceeding relied on the proscription of §7(a) forbidding the FPC to compel a natural gas company to sell gas when such a sale would impair the company's ability to adequately serve existing customers, it is squarely based on the premise that, absent any § 7(b) issue of abandonment, a certificated direct sale cannot be indirectly controlled by the FPC. It is also worthy of note that the court observed that matters occurring after the Commission enters an order cannot be used to retroactively validate that order. Certainly the converse is equally logical — matters occurring after the issuance of a certificate cannot be used to invalidate the certificate, unless the Act confers a source of continuing authority to revise and amend that certificate. In *Colorado Interstate Gas Company* v. *Federal Power Commission,* 185 F.2d 357 (3rd Cir. 1950), the court quoted the identical language from the Supreme Court's opinion in *Panhandle Eastern Pipe Line Co., supra,* that we quoted above and then stated:

> Nothing need be added to this clear statement of the coverage of the act. When applied to the problem before us it means that the power of the Commission to regulate the sale of natural gas by Colorado Interstate extends only to sales to buyers for resale and not to sales to buyers for their own consumption. That being the extent of the authority which Congress has conferred upon the Commission that body is without auth-

> ority to compel Colorado Interstate to make its gas tariff applicable to any sales other than those for resale. It is beyond the power of the Commission to require a natural gas company within its jurisdiction to make its tariff applicable to sales which are not within the regulatory power of the Commission for this would be in effect to regulate such sales.

Yet this is precisely what the Commission has undertaken to do in the situation at bar. Its opinion No. 606 requires United to file a plan for the curtailment of direct sales, including those made to LP&L under these contracts in the form of new and amended tariff sheets. *See also City of Hastings, Nebraska* v. *Federal Power Commission*, 221 F.2d 31 (D.C. Cir. 1954).

Panhandle Eastern Pipe Line Co. v. *FPC*, 232 F.2d 467 (3rd Cir. 1956) is not to the contrary. In that case the Federal Power Commission had granted a pipeline company *conditional* certificates and, before the certificates were made final it required the company to file tariffs which contained interruptible priorities for excess gas. After this requirement was made by FPC, the pipeline company acquired new direct sales customers to absorb its excess gas supply and thereby attempted to circumvent the restriction. The Court refused to allow this negation of the FPC's requirement. This case turned upon the recognized jurisdiction vested in the Commission to consider end use and price factors in determining *initial* permanent certification, and not upon any recognition of a right of continuing certificate jurisdiction. The court distinguished rather than overruling or modifying its prior opinion in *Colorado Interstate Gas Company, supra*.

We also distinguish the 6th Circuit's 1949 decisions denying specific performance in one instance and injunctive relief in another as to disputes between a pipeline company

and a purchaser of natural gas for resale. *Michigan Consolidated Gas Co.* v. *Panhandle Eastern Pipe Line Co.*, 173 F.2d 784, and *Panhandle Eastern Pipe Line Co.* v. *Michigan Consolidated Gas Co.*, 177 F.2d 942. Authority over the interstate gas sale of a pipeline company and a purchaser for resale which was sought to be court-litigated, was clearly vested in the FPC. That is not the case here.

The Commission contends that the provisions of § 4 (b),[13] which prohibit regulated pipeline companies from granting undue preferences respecting transportation of gas subject to the Act, when coupled with § 5(a),[14] authorizing FPC elimination of such practices, grant the authority to exercise continuing supervisory authority over all aspects of certificated direct sales transactions. This contention is but another form of the proposition advanced under § 7 which we have dealt with above. Carried as far as the FPC urges, it would bring the agency's transportation authority into irreconcilable conflict with the Act's equally viable express direct sale reservation.

Summarizing, we hold that the FPC has no form of continuing certificate jurisdiction over direct sales to cus-

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[13] "No natural-gas Company shall, with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service. 15 USCA 717c(b).

[14] "Whenever the Commission . . . shall find . . . that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order."
15 USCA 717d(a).

tomers of interstate pipeline companies. It has the initial right to issue or veto a certificate of public convenience and necessity and it must give its approval to the abandonment of the use of the certificated facilities, but between the two functions the express exemption of regulatory power over such consumptive sales bars agency intervention.

Has the "Green System" Become Interstate? (The Nine-Mile Station Issue.)

There is no dispute in the record as to any fact bearing on this point.

All of the gas moving to the Nine-Mile Point Generating Station is delivered through the Green pipeline system, which is located entirely within the State of Louisiana. All gas consumed at the station is produced in Louisiana. During 1970 United chose to fulfill 2.6% of its contract commitment with gas which was flowed a portion of its way from certain Louisiana wells to a valve connection to the Green system, through United's Black (interstate) pipeline system. It is particularly significant that this minor amount of interstate gas had been introduced *into* the Green system, and that no intrastate gas could flow *from* the Green system into the Black system because of the pressure differential between the systems. Although a physical connection permits the Black to Green flow, the two systems are otherwise entirely separate facilities. Approximately 4,000,000 Mcf units of gas were added to the Green system from the Black system in 1970 out of a total of more than 155,000,000 Mcf units which were delivered by the Green system that year. Through an affiliate, United controlled gas wells in Louisiana (which wells were equipped to deliver fuel to both the Black and Green systems, but in fact delivered only to the Black system) that produced more than the entire amount of gas diverted from the Black system into the Green system in 1970.

United and the FPC rely upon this circuit's holding in *Louisiana Public Service Commission* v. *FPC*, 359 F.2d 525 (5th Cir. 1966), commonly called the Florida Parishes case to show the Green system must now be certificated. LP&L argues that since United had within its control the power to meet its obligations to Green system customers using only intrastate gas, the fact that it chose at times to co-mingle a small amount of otherwise intrastate gas with interstate gas and then redeliver it to the Green system, distinguishes the Florida Parishes situation and gives United no basis for seeking to transfer the Green system from Louisiana to federal control.

In determining whether a particular gas delivery system is subject to federal regulation neither contract stipulations nor other conventions or legal fictions control. The court must examine "the anatomy of the pipeline system to discover the channel of constant flow" to see if, in fact, gas crosses a state line at any stage of its movement from wellhead to ultimate consumption. If it does, it is interstate gas. *People of the State of Calif.* v. *Lo-Vaca Gathering Co.*, 379 U.S. 366, 85 S.Ct. 486, 13 L.Ed.2d 357 (1965); *FPC* v. *Amarada Petroleum Corp.*, 379 U.S. 687, 85 S.Ct. 632, 13 L.Ed.2d 605, *reh. denied* 380 U.S. 959, 989, 85 S.Ct. 1081, 1327, 13 L.Ed.2d 976, 14 L.Ed.2d 283 (1965).

The lower court held that this analysis of constant flow required agency expertise and that it should refuse to exercise its jurisdiction and require exhaustion of administrative remedies. Without adopting any sweeping or dogmatic contrary rule for every imaginable case, we disagree in the case at bar. The solution to the legal problem here depends upon simple flow mechanics, which are demonstrated in this record by uncontradicted evidence. It requires no expertise to determine that the channel of constant flow, insofar as the gas passed through and consumed from

the Green system is concerned, is essentially within the State of Louisiana. There is no attempt here to clothe interstate gas with an intrastate or non-jurisdictional sale character by contract language as was present in the *Lo-Vaca* and *Amarada* cases, *supra*. The intrastate character of this sale is based on substance — the physical movement of gas — not on any formalism or technicality.

The Florida Parishes case is equally factually distinguishable. There, gas from Louisiana wells was collected and delivered into large high-pressure gas transmissions mains which transported substantial volumes of gas in interstate commerce to points in Mississippi and Alabama. Lateral connections from these main pipelines were used to serve towns in Louisiana. The court described the lines as "part of a fully integrated system by means of which United transports and sells gas from the states of Texas, Louisiana and Mississippi to industrial customers, pipeline's and local distributors in those states and in Alabama and Florida." An analysis of the anatomy of constant flow in the single system which served these towns demonstrated that gas had to move through interstate facilities to reach them. They did not receive their gas through a distinct and geographically localized system such as the Green system here.[15] The *Amarada* case also is physically distinct. Although more of the gas which the contracts there attempted to classify as intrastate actually flowed in interstate commerce in the summer months, a substantial volume flowed in the winter months also. Thus, analysis showed a constancy of interstate movement. The *Lo-Vaca* case presented an attempt to contractually formalize two gas sales which

[15] In fact, our Florida Parishes opinion was careful to point out: "the question under consideration has no relation to United's purely intrastate pipeline facilities which are completely separate from its interstate system and over which the commission has not asserted jurisdiction."

moved through an interstate pipeline as direct sales and therefore exempt from regulation. The Court disregarded the contract language and looked to see, not only that these sales were only a portion of the volume of interstate gas moving in a single system, but also that a portion of this gas was in fact resold outside of the state where it was produced.

In contra-distinction to each of these cases, the flow of gas from the Black system into the Green system in the case at bar is occasional and irregular, as well as minimal. The Green system, as an entire and separate unit, is physically located in and functions entirely in Louisiana. Therefore, the undisputed facts show that the channel of constant flow is an intrastate and not an interstate channel. The regulation of the Green system is substantially and essentially a localized matter committed to Louisiana's jurisdicton.[16]

Do FPC Proceedings Bar Court Relief?

Both United and the FPC contend that the curtailment proceedings in Docket No. RP 71-29 and the certificate proceedings in Docket No. CP 71-89 are within the jurisdiction of the FPC and that the court was correct in dismissing the present action. All parties cite numerous precedents, most from the Supreme Court. An attempt at rationalization would needlessly lengthen this opinion. The

[16] LP&L has urged that the clearly erroneous review standard of Fed.R.Civ.P. 52(b) must be applied here. We note, however, our ruling does not involve any disagreement with facts found by the district court. We only differ with the interpretation he places on undisputed evidence. Such interpretations are reviewable "free from the restraining impact of the so-called 'clearly erroneous' rule." See B & M Company v. United States ..... F.2d ..... (5th Cir. 1971) [71-1320 December 1, 1971]

entire area has been thoroughly analyzed by a leading text in the field. It collects and discusses most of the authorities relied on by both sides. It was relied upon by the court below and we rely upon it here. *See* 3 K. Davis, Administrative Law Treatise §§ 20.01 through 20.03.

Because we hold the lower court erred in its holding regarding potential injury and in its views as to primacy of agency jurisdiction, we arrive at a different result in applying Professor Davis' three-part test (§ 20.03).

See Bailey v. *United States*, ... F.2d ..... (5th Cir. 1971) [No. 71-1731, December 8, 1971], and *cf. United States* v. *Hernandez*, ... F.2d ..... (5th Cir. 1971) [No. 71-1656, December 27, 1971].

Is This Appeal Moot?

United also urges that the rendition of the FPC's opinion No. 606 has rendered the present action moot. We disagree. That opinion is subject to court review under § 19 of the Act.[17] An appeal has been taken by LP&L to this court from Opinion No. 606 and is now pending as Cause No. 71-3429. Thus, there is an unusual confluence of reviews in this court in the matter *subjudice*. However, until affirmance upon the completion of court review, FPC Opinion No. 606 is not a final determination of the issues presented. It would be a strange, Frankenstein sort of legislative delegation that would empower the agency it creates to declare its own extent. Without at all intimating what weight should ultimately be assigned to the conclusions of Opinion No. 606, we are firm in our conviction that it does not oust the adjudicatory power of a court that has

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[17] 15 USCA 717r

reviewing authority over both the court and the agency proceedings.[18]

CONCLUSION

LP&L had no burden to demonstrate that its allegations of irreparable injury were correct on the preliminary hearing of its opponents' motions to dismiss. The FPC lacked jurisdiction over the previously certificated direct sales to Sterlington, and over the intrastate sales at Nine-Mile Point, therefore declining jurisdiction and requiring exhaustion was error. The order dismissing this cause is reversed and the cause is remanded with directions to expedite the hearing and disposition of this cause on its merits.

REVERSED and REMANDED,
with directions.

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[18] If Opinion No. 606 has any instant effect it may be contrary to United's urgings. In the sense that it is a final agency action, its finality could militate against United's claim that the agency's primary jurisdiction still bars court action. However, without pausing to consider the ramifications of collateral versus direct review rights since both court and agency action are before us now, we express no opinion on this aspect of the matter.

APPENDIX B

United States Court of Appeals

FOR THE FIFTH CIRCUIT

OCTOBER TERM, 1971

No. 71-2550

D. C. DOCKET No. 16637

LOUISIANA POWER & LIGHT COMPANY,

Plaintiff-Appellant,

VERSUS

UNITED GAS PIPE LINE COMPANY, ET AL.,

Defendants-Appellees,

FEDERAL POWER COMMISSION

Intervenor.

Appeal from the United States District Court for the Western District of Louisiana

Before THORNBERRY, MORGAN and CLARK, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Western District of Louisiana, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the order of the District Court appealed from, in this cause be, and the same is hereby, reversed; and that this cause be, and the same is hereby remanded to the said District Court with directions to

expedite the hearing and disposition of this cause on its merits;

It is further ordered that defendants-appellees pay to plaintiff-appellant the costs on appeal to be taxed by the Clerk of this Court.

January 14, 1972

Issued As Mandate:

APPENDIX C

IN THE

United States District Court

FOR THE
WESTERN DISTRICT OF LOUISIANA
MONROE DIVISION

CIVIL ACTION NO. 16637

LOUISIANA POWER & LIGHT COMPANY,

VS.

UNITED GAS PIPE LINE COMPANY
AND PENNZOIL UNITED, INC.

MESSRS.

FOR PLAINTIFF: THOMAS W. LEIGH
THEUS, GRISHAM, DAVIS & LEIGH
P. O. Box 1671
Monroe, Louisiana 71203
ANDREW P. CARTER
MONROE & LEMANN
1424 Whitney Building
New Orleans, Louisiana

FOR DEFENDANTS: JOHN T. GUYTON
P. O. Box 1574
Shreveport, Louisiana 71102

WILLIAM R. CHOATE
BAKER & BOTTS
#1 Shell Place
Houston, Texas

NAUMAN S. SCOTT, Judge:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This is an injunctive proceeding brought by Louisiana Power and Light Company (LPL) against defendants United Gas Pipe Line Company (United) and Pennzoil United, Inc. (Pennzoil) to restrain and enjoin the defendants from curtailing the supply of gas to plaintiff's Sterlington and Nine Mile Point generating stations in Louisiana and ordering defendants to deliver natural gas to plaintiff in accordance with the provisions of the current contracts between LPL and United.

LPL is a Florida corporation having its principal place of business in the State of Louisiana and is a "public utility" within the meaning of the Federal Power Act, 16 U.S.C. 791(a) *et seq.* and is the owner and operator of the Sterlington and Nine Mile Point electric generating plants previously mentioned.

Pennzoil and its wholly-owned subsidiary, United, are Delaware corporations having their principal place of business in the State of Texas. United is engaged in the transmission of natural gas through transmission lines located in states including Louisiana, Texas and Mississippi and also delivers to interstate pipe line companies for resale. United has been furnishing natural gas to LPL at both the Nine Mile Point Station and the Sterlington Station under contract for many years.

JURISDICTION

LPL asserts that this Court has jurisdiction under 28 U.S.C. 1332 because this is a civil action in which the matter in controversy exceeds the sum or value of $10,000.00, and is between citizens of different states.

THE ISSUE

Pennzoil, United and the Intervenor, Federal Power Commission (FPC) dispute this Court's jurisdiction and have filed motions to dismiss on the contention that this matter involves a proceeding (curtailment of natural gas) which is presently before the FPC, that LPL is an active participant and a party to these proceedings before the Commission, and that the FPC has exclusive jurisdiction under Sections 4(b), 5(a), and 15 of the Natural Gas Act [15 U.S.C. 717(c), 717(d), and 717(o)].

FINDINGS OF FACT

1. United has supplied gas to LPL's Sterlington Station under contracts which include a provision entitled "Impairment of Deliveries" as follows:

> "In the event a shortage of gas renders Seller unable to supply the full gas requirements of all its consumers, then it is mutually agreed that the gas requirements of gas utilities selling gas to domestic consumers and public utility power plants using gas for generation of electricity which is sold to domestic consumers shall first be supplied by Seller, and the remaining available gas shall be prorated by Seller among its other consumers."

2. United has supplied gas to LPL's Nine Mile Point Station under contracts containing provisions entitled "Impairment of Deliveries" as follows:

> "Buyer specifically recognizes the fact that Seller delivers gas to gas utilities for resale to domestic consumers and to other industrial consumers. In the event a shortage of gas renders Seller unable to supply the full gas requirements of all its requirements of gas utilities selling gas to domestic consumers shall first be supplied by Seller and next the gas requirements of

public utility power plants (including plant of Buyer) using gas for generation of electricity which is sold to domestic consumers, shall be supplied, and if Seller does not have sufficient gas to supply all of the requirements of said power plants, then said requirements shall be supplied ratably. The remaining available gas supply shall be prorated by Seller among its other consumers."

3. It is conceded that LPL is an industrial consumer and utilizes the gas delivered to it to generate the electric power at its Sterlington and Nine Mile Point stations and not for the purpose of resale.

4. All gas delivered by United to the Sterlington and Nine Mile Point Stations is produced in Louisiana. All deliveries of gas to the Sterlington Station are interstate gas. Deliveries of gas to the Nine Mile Station are made through the "Green" Pipe line which is located entirely within the State of Louisiana. The great bulk of the gas in the "Green" line is intrastate gas. However, some gas is dumped into the "Green" pipe line from the "Black" pipe line. This is interstate gas so there is a co-mingling of intrastate and interstate gas in the "Green" pipe line. An application is presently pending before the Federal Power Commission (RP71-89) to certify the "Green" pipe line.

5. United filed with the FPC on October 26, 1970 a petition for a declaratory order to curtail gas deliveries during the winter months (November 1 to April 1) on a ratable basis and in the following order: (1) gas used for industrial purposes, including gas used to generate electricity which in turn is applied to industrial uses, (2) gas used to generate electricity which is consumed by domestic customers, and (3) gas used by domestic consumers. United alleged that the curtailment was made necessary because the gas supply was insufficient to meet its contract requirements. Attached to the petition are exhibits including exhibits showing the

United customers affected by the proposed curtailment, as follows:

Jackson Area

Industrials	6 customers
Power Plants	4 customers
Pipelines	2 customers
City Gates	1 customer

Mobile-Pensacola Area

Industrials	17 customers
Power Plants	2 customers
City Gates	3 customers

Shreveport Area

Industrials	5 customers
Power Plant	1 customer
Pipelines	6 customers
City Gates	2 customers

New Orleans Area

Industrials	4 customers
Power Plants	3 customers
City Gates	2 customers

Lafayette Area

Industrials	2 customers
Power Plants	1 customer

These are the parties (customers) affected by the FPC proceeding RP71-29 who are not parties to this suit.

6. LPL filed its petition to intervene in RP71-29 on November 25, 1970 stating the "impairment of deliveries" articles of its contracts with United. It also stated its proposed curtailment violated these contracts: that the FPC did not have jurisdiction over United's sales to LPL because they constitute "direct sales" which are exempt under Section 1(b) of the Natural Gas Act and requests to participate in the hearing without waiving these objections. (FPC Exhibit 3, Item 5).

7. The FPC approved United's curtailment program for the 1970-71 winter season by order in FPC Docket No. RP71-29 dated December 29, 1970 (FPC Exhibit 3, Item 7). This order was issued as a result of the settlement between the parties, including LPL.

8. United filed a supplemental petition in RP71-29 on February 22, 1971 for the extension of its curtailment program from April 1, 1971 through October 31, 1971 (FPC Exhibit 3, Item 3). The record does not disclose the number of identity of intervenors, including LPL, who intervened prior to November 25, 1970 in RP71-29, however, an order was issued March 10, 1971 permitting the intervention by Aluminum Company of America, Boise Southern Company, Container Corporation of America, Marquette Cement Manufacturing Company, National Gypsum Company, New Jersey Natural Gas Company, Scott Paper Company, Transcontinental Gas Pipeline Corporation and United Gas, Inc., and on April 12, 1971 an order issued permitting the intervention of the City of Pensacola, Florida, et al, Clarke-Mobile Counties Gas District, General Services Administration, Northern Illinois Gas Company and Mississippi Public Service Commission (FPC Exhibit 3, Items 9 & 10).

9. LPL has not denied United's assertion that its supply of gas is inadequate to meet its present and impending gas delivery commitments. It has, in fact, agreed to the curtailment approved in the order of December 29, referred to in Finding 7 above. The fact that the Natural Gas Transmission Industry has recently experienced a decline in the ratio of crude natural gas reserves to annual volume of consumption caused in part by the increasing demand for natural gas by customers and the declining rate of additions to the natural gas reserves has been judicially noticed by the Fifth Circuit, *Austral Oil Co.* v. *Federal Power Comm'n.*,

428 F.2d 405 (5th Cir.), Cert. denied, 400 U.S.C. 950 (1970) (Southern Louisiana Area Rate Cases).

10. FPC Order No. 431 directed interstate pipe lines, including United, to take steps, including filling storage fields, in order to insure capacities to meet the heating season demands for the winter of 1971-72 (November 1, 1971 to March 31, 1972). The Order further directed the pipe lines to file plans within thirty days indicating the way in which the pipe lines proposed to meet the winter heating season demands. United filed its response on May 17, 1971; the Commission docketed the response under FPC Docket No. RP71-120 and then on May 28, 1971 order Docket No. RP71-120 consolidated for hearing and decision with Docket No. RP71-29. That order provided that persons who are parties to the proceeding in Docket No. RP71-29 will be deemed to be parties in the consolidation and need not file to intervene in Docket No. RP71-120.

11. LPL has alleged (Complaint Paragraph 17) that the proposed curtailment by United could ultimately effect a "black-out" or "brown-out" which, under certain circumstances, could cover an area as large as the whole State of Louisiana or, indeed, a several-state area such as occured during the notorious "northeast black-out" in 1965. The record is bare of any evidence to support this allegation.[1]

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[1] Mr. J. M. Wyatt, Vice President of LPL, testified as follows when cross-examined by Mr. Gooch, representing the FPC:

"BY MR. GOOCH:

Q. All right, sir. Now let's look under such things as litigation and regulations in the registration statement filed by the SEC. Mr. Carter has just said that they were not going to assume they would lose any suits. Would you show me anywhere in this registration statement filed in April, where Mr. Carter even disclosed to the public that there was a suit pending which could cause Louisiana Power and Light Company to suffer brown-outs and black-outs if this allegation were true?

In fact, in a registration statement filed by LPL with the Securities and Exchange Commission on February 19, 1971, the following statement was made:

"FUEL SUPPLY. The Company's primary fuel is natural gas. Two of the Company's three major generating stations are outfitted to burn oil as a standby fuel, and the third station is presently being modified to allow the burning of oil as a standby fuel and this modification is scheduled for completion by June 1971. The Company has firm contracts for an adequate supply of gas for all generating capacity which is or will be operational prior to 1974 (3404 MW), which contracts have various expiration dates from 1978 to 1993. During the winter of 1970-71 gas was curtailed to some extent by one supplier who supplies gas to approximately 550 MW of generating capability. After June 1971 the Company expects to be able to offset any foreseeable gas curtailment by burning oil. The supply of fuel for generating units that will become operational in 1974 and thereafter is being negotiated at this time." FPC Exhibit 21.

A. If I understand your question, I don't see why it would be necessary to notify, because there was nothing involved here that would cause brown-outs or black-outs on this suit.

Q. Nothing involved in the suit?

A. In the suit that I am looking at here, if I understand your question.

Q. My question is — is the suit that we are here in Court for today, do you see that disclosed anywhere, to the public, that it is pending?

A. No, it is not in here.

Q. All right. Now, would you please look at the date of this certificate?

A. Yes.

Q. Will you tell the Court what this is?

A. May 19, 1971.

Q. Are you aware of the filing with the SEC that would either call to the attention the pendency of this suit to those who may be interested in purchasing Louisiana Power and Light securities or reporting any change in your fuel oil situation subsequent to May 19, 1971?

A. I am not aware of it." (Tr. p. 103).

12. On March 31, 1971, LPL, although it was an active participant in the curtailment proceeding before the FPC, filed its complaint in this Court, seeking to enjoin United's curtailment program insofar as it affected LPL's Sterlington and Nine Mile Point Stations. The trial Court, after considering the pleadings of LPL and the briefs and arguments of its counsel granted a Temporary Restraining Order on April 27, 1971.

13. On April 28, 1971, the FPC intervened and filed a Motion to Dismiss for lack of subject matter jurisdiction. United-Pennzoil, on April 29, 1971, filed its Motion to Dismiss.

14. The Court considering the additional pleadings then before it, dissolved the temporary restraining order on April 29, 1971 and dismissed the case for lack of jurisdiction. LPL filed a Notice of Appeal and moved for a stay order which the Court refused. The matter is now before this Court on an Order of the Fifth Circuit Court of Appeals dated May 14, 1971 vacating the trial Court's judgment of dismissal and remanding the case to the District Court for an expedited hearing on the jurisdictional issue and such other preliminary issues as might be properly raised.

15. The original trial judge having recused himself, the matter was assigned to this Court for hearing and a full evidentiary hearing was conducted on May 27, 1971.

CONCLUSIONS OF LAW

LPL seeks an injunction restraining and enjoining United and Pennzoil from curtailing the supply of gas to the Sterlington and Nine Mile Point generating stations of LPL in breach of United's contracts with LPL, and ordering said

companies to deliver natural gas to LPL in accordance with the provisions of said contracts.

LPL is not entitled to injunctive relief unless it clearly establishes that it is threatened with irreparable injury. It alleges that its Sterlington Station has no alternative source of energy (Complaint Paragraph 17) and that the implementation of the curtailment might result in an extensive "Brown-out" or "Black-out" (Complaint Paragraph 16). LPL has failed to establish irreparable injury (Findings of Fact No. 11) and therefore is not entitled to injunctive relief. However, the Court does not choose to rest judgment solely on these grounds, since the Court of Appeals has directed that a specific finding should be made on the jurisdictional issue.

LPL forcefully contends that this Court has primary jurisdiction and that the FPC lacks jurisdiction because (1) the gas delivered to the Nine Mile Point Station is "intrastate gas" not subject to the jurisdiction of the FPC and (2) direct sales such as the sales from United to LPL are exempt from the jurisdiction of the Commission under the provisions of Section 1(b) of the Natural Gas Act (15 U.S.C. 717).

It is not clearly established by the record that the gas delivered to the Nine Mile Point Station is "intrastate gas", since some "interstate gas" is dumped into the system which supplies the Nine Mile Point Station (Findings of Fact No. 6). The determination of this question is within the fundamental jurisdiction of the FPC, requires the expertise of that agency and is presently pending before that Agency in Docket No. RP71-89. The same problems were properly disposed of in the Florida Parishes cases. In the Matter of United Gas Pipe Line Company, Docket No. CP 62-161, 30 FPC 560, affirmed on appeal, sub nom., *Louisiana Public*

Service Commission et al v. *Federal Power Commission et al*, 359 F.2d 525, cert. denied, 385 U.S. 833, 17 L.Ed. 68, 87 S.Ct. 73.

LPL's second contention is predicated on a finding that the question at issue is the violation of provisions of its direct sales contract with United. However, United's application to the FPC in RP71-29 is couched in terms of a curtailment proceeding (FPC Exhibit 3, Item 1). The exhibits and testimony pertaining to volumes of gas — supply and delivery. It seems fairly obvious that if the Court required delivery of the full gas contract commitment to LPL, the gas supply available to United's other customers would be reduced and the curtailment of gas supply to other customers would be proportionately affected. Thus all of United's customers have an interest, including more than 50 intervenors in RP71-29. A cursory examination of the testimony and the exhibits produced at the hearing before this Court on May 27 will demonstrate the complexities and the technical nature of the matters involved in United's application and the special expertise required to resolve it. This is a curtailment proceeding. The proposed curtailment program certainly affects deliveries to United's customers under direct sales contracts such as LPL. However, this is a collateral effect of the curtailment and does not necessarily convert it into an attempt by the FPC to exert jurisdiction over such direct sales contracts.

The threatened irreparable injury alleged by LPL (possible "brown-out" or "black-out") is related solely to the volume of gas delivered. There is no proof that LPL actually requires its full contract commitment of gas to avoid this consequence. It received less than contract commitments during the winter months of 1970-71 without experiencing such injury. This Court cannot assume, especially in an injunction proceeding, that the full contract commit-

ment of gas is required by LPL to avoid its alleged injury. The injunction could not be granted if standby fuel, as alleged by defendants, is available. The contracts are strictly collateral to the issue before the Court.

United, Pennzoil and the FPC urge that LPL is not entitled to judicial relief until it has exhausted its administrative remedies in the FPC. The Courts have not uniformly followed this precept. Professor Davis, in his *Administrative Law Treatise*, Volume 3, Section 20.03, Page 69, suggests factors which should be considered in determining whether this precept should be followed:

> "The key factors are three: extent of injury from pursuit of administrative remedy, degree of apparent clarity or doubt about administrative jurisdiction, and involvement of specialized administrative understanding in the question of jurisdiction. Unfortunately, each of these three key factors is a variable, and each often calls for a considerable amount of judgment for its proper appraisal.
>
> A workable standard probably should not go beyond a statement that each of these three factors should be weighed in determining whether or not a court should decide an issue of administrative jurisdiction without requiring exhaustion of administrative remedies. A neat word formula probably is not feasible."

As noted above, LPL has made no attempt to establish the minimum volume of gas which is required to maintain its service, or that the amount allocated to it under the curtailment program is insufficient to meet its minimum requirements. The contracts are hardly pertinent to these issues. The Court finds that LPL has not proved the extent of possible injury which might result from pursuit of the administrative remedy, that the curtailment proceedings are well within the jurisdiction of the FPC and that the

expertise of the FPC is necessary for the proper consideration and disposition of the issues presented in this proceeding. LPL must exhaust its administrative remedies despite its assertion that the FPC lacks jurisdiction. *Myers* v. *Bethlehem Steel Corp.*, 303 U.S. 41, 82 L.Ed. 638, 58 S.Ct. 459; *Macauley* v. *Waterman S.S. Corp.*, 327 U.S. 540, 90 L.Ed. 839, 66 S.Ct. 712; *Federal Power Commission* v. *Arkansas Power & Light Co.*, 330 U.S. 802, 91 L.Ed. 1261, 67 S.Ct. 962, rev'g 156 F.2d 821; *Union Oil Co. of California* v. *Federal Power Commission*, 236 F.2d 816 (5th Cir. 1956), Cert. denied, 352 U.S. 696, 1 L.Ed. 323, 77 S.Ct. 360; and *Lone Star Cement Corp.* v. *Federal Trade Commission*, 339 F.2d 505. The FPC is competent to decide its jurisdiction and should do so. *City of Hastings, Nebraska* v. *Federal Power Commission*, C.A.D.C. 221 F.2d 31; *Marine Engineers* v. *Interlake S.S. Co.*, 370 U.S. 173, 8 L.Ed.2d 418, 82 S.Ct. 1237.

The motions of United, Pennzoil and the FPC to dissolve the temporary restraining order and to dismiss this suit are granted and the temporary restraining order heretofore issued on April 27, 1971 is dissolved.

Counsel for defendants United and Pennzoil and for Intervenor FPC immediately shall prepare a proper decree and obtain approval thereof from counsel for plaintiff LPL in accordance with Rule 9 of this Court and present such judgment for signature as expeditiously as possible.

THUS DONE AND SIGNED at Alexandria, Louisiana, this 25th day of June, 1971.

NAUMAN S. SCOTT
United States District Judge

APPENDIX D

§ 717 Necessity for regulation of natural gas companies

(a) As disclosed in reports of the Federal Trade Commission made pursuant to S.Res. 83 (Seventieth Congress, first session) and other reports made pursuant to the authority of Congress, it is declared that the business of transporting and selling natural gas for ultimate distribution to the public is affected with a public interest, and that Federal regulation in matters relating to the transportation of natural gas and the sale thereof in interstate and foreign commerce is necessary in the public interest.

(b) The provisions of this chapter shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas.

(c) The provisions of this chapter shall not apply to any person engaged in or legally authorized to engage in the transportation in interstate commerce of the sale in interstate commerce for resale, of natural gas received by such person from another person within or at the boundary of a State if all the natural gas so received is ultimately consumed within such State, or to any facilities used by such person for such transportation or sale, provided that the rates and service of such person and facilities be subject to regulation by a State commission. The matters exempted from the provisions of this chapter by this subsection are declared to be matters primarily of local concern

and subject to regulation by the several States. A certification from such State commission to the Federal Power Commission that such State commission has regulatory jurisdiction over rates and service of such person and facilities and is exercising such jurisdiction shall constitute conclusive evidence of such regulatory power or jurisdiction. June 21, 1938, c. 556, § 1, 52 Stat. 821; Mar. 27, 1954, c. 115, 68 Stat. 36.

§ 717c. Rates and charges; schedules; suspension of new rates

(a) All rates and charges made, demanded, or received by any natural-gas company for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges, shall be just and reasonable, and any such rate or charge that is not just and reasonable is declared to be unlawful.

(b) No natural-gas company shall, with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

(c) Under such rules and regulations as the Commission may prescribe, every natural-gas company shall file with the Commission, within such time (not less than sixty days from June 21, 1938) and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection, schedules showing all rates and charges for any transportation or sale subject to the juris-

diction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

(d) Unless the Commission otherwise orders, no change shall be made by any natural-gas company in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Whenever any such new schedule is filed the Commission shall have authority, either upon complaint of any State, municipality, State commission or gas distributing company, or upon its own initiative without complaint, at once, and if it so orders, without answer or formal pleading by the natural-gas company, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the natural-gas company affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into

effect, and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of the suspension period, on motion of the natural-gas company making the filing, the proposed change of rate, charge, classification, or service shall go into effect. Where increased rates or charges are thus made effective, the Commission may, by order, require the natural-gas company to furnish a bond, to be approved by the Commission, to refund any amounts ordered by the Commission, to keep accurate accounts in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid, and, upon completion of the hearing and decision, to order such natural-gas company to refund, with interest, the portion of such increased rates or charges by its decision found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the natural-gas company, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible. June 21, 1938, c. 556, § 4, 52 Stat. 822; May 21, 1962, Pub.L. 87-454, 76 Stat. 72.

§ 717d. Fixing rates and charges; determination of cost of production or transportation

(a) Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing company, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company

in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order: *Provided, however,* That the Commission shall have no power to order any increase in any rate contained in the currently effective schedule of such natural gas company on file with the Commission, unless such increase is in accordance with a new schedule filed by such natural gas company; but the Commission may order a decrease where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates.

(b) The Commission upon its own motion, or upon the request of any State commission, whenever it can do so without prejudice to the efficient and proper conduct of its affairs, may investigate and determine the cost of the production or transportation of natural gas by a natural-gas company in cases where the Commission has no authority to establish a rate governing the transportation or sale of such natural gas. June 21, 1938, c. 556, § 5, 52 Stat. 823.

§ 717f. Construction, extension, or abandonment of facilities; certificate of convenience and necessity; condemnation proceedings

(a) Whenever the Commission, after notice and opportunity for hearing, finds such action necessary or desirable in the public interest, it may by order direct a natural-gas company to extend or improve its transportation facilities, to establish physical connection of its transportation facili-

ties with the facilities of, and sell natural gas to, any person or municipality engaged or legally authorized to engage in the local distribution of natural or artificial gas to the public, and for such purpose to extend its transportation facilities to communities immediately adjacent to such facilities or to territory served by such natural-gas company, if the Commission finds that no undue burden will be placed upon such natural-gas company thereby: *Provided*, That the Commission shall have no authority to compel the enlargement of transportation facilities for such purposes, or to compel such natural-gas company to establish physical connection or sell natural gas when to do so would impair its ability to render adequate service to its customers.

(b) No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment.

(c) No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations: *Provided, however*, That if any such natural-gas company or predecessor in

interest was bona fide engaged in transportation or sale of natural gas, subject to the jurisdiction of the Commission, on February 7, 1942, over the route or routes or within the area for which application is made and has so operated since that time, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission within ninety days after February 7, 1942. Pending the determination of any such application, the continuance of such operation shall be lawful.

In all other cases the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission; and the application shall be decided in accordance with the procedure provided in subsection (e) of this section and such certificate shall be issued or denied accordingly: *Provided, however,* That the Commission may issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of an application for a certificate, and may by regulation exempt from the requirements of this section temporary acts or operations for which the issuance of a certificate will not be required in the public interest.

(d) Application for certificates shall be made in writing to the Commission, be verified under oath, and shall be in such form, contain such information, and notice thereof shall be served upon such interested parties and in such manner as the Commission shall, by regulation, require.

(e) Except in the cases governed by the provisos contained in subsection (c) of this section, a certificate shall be

issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of this chapter and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension or acquisition, to the extent authorized by the certificate is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require.

(f) The Commission, after a hearing had upon its own motion or upon application, may determine the service area to which each authorization under this section is to be limited. Within such service area as determined by the Commission a natural-gas company may enlarge or extend its facilities for the purpose of supplying increased market demands in such service area without further authorization.

(g) Nothing contained in this section shall be construed as a limitation upon the power of the Commission to grant certificates of public convenience and necessity for service of an area already being served by another natural-gas company.

(h) When any holder of a certificate of public convenience and necessity cannot acquire by contract, or is unable to agree with the owner of property to the compensation to be paid for, the necessary right-of-way to construct, operate, and maintain a pipe line or pipe lines for the transportation

of natural gas, and the necessary land or other property, in addition to right-of-way, for the location of compressor stations, pressure apparatus, or other stations or equipment necessary to the proper operation of such pipe line or pipe lines, it may acquire the same by the exercise of the right of eminent domain in the district court of the United States for the district in which such property may be located, or in the State courts. The practice and procedure in any action or proceeding for that purpose in the district court of the United States shall conform as nearly as may be with the practice and procedure in similar action or proceeding in the courts of the State where the property is situated: *Provided,* That the United States district courts shall only have jurisdiction of cases when the amount claimed by the owner of the property to be condemned exceeds $3,000. June 21, 1938, c. 556, § 7, 52 Stat. 824; Feb. 7, 1942, c. 49, 56 Stat. 83; July 25, 1947, c. 333, 61 Stat. 459.

§ 717o. Administrative powers of Commission; rules, regulations, and orders

The Commission shall have power to perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of this chapter. Among other things, such rules and regulations may define accounting, technical, and trade terms used in this chapter; and may prescribe the form or forms of all statements, declarations, applications, and reports to be filed with the Commission, the information which they shall contain, and the time within which they shall be filed. Unless a different date is specified therein, rules and regulations of the Commission shall be effective thirty days after publication in the manner which the Commission shall prescribe. Orders of the Commission shall be effective on the date and in the

manner which the Commission shall prescribe. For the purposes of its rules and regulations, the Commission may classify persons and matters within its jurisdiction and prescribe different requirements for different classes of persons or matters. All rules and regulations of the Commission shall be filed with its secretary and shall be kept open in convenient form for public inspection and examination during reasonable business hours. June 21, 1938, c. 556, § 16, 52 Stat. 830.

§ 717r. Rehearings; court review of orders

(a) Any person, State, municipality, or State commission aggrieved by an order issued by the Commission in a proceeding under this chapter to which such person, State, municipality, or State commission is a party may apply for a rehearing within thirty days after the issuance of such order. The application for rehearing shall set forth specifically the ground or grounds upon which such application is based. Upon such application the Commission shall have power to grant or deny rehearing or to abrogate or modify its order without further hearing. Unless the Commission acts upon the application for rehearing within thirty days after it is filed, such application may be deemed to have been denied. No proceeding to review any order of the Commission shall be brought by any person unless such person shall have made application to the Commission for a rehearing thereon. Until the record in a proceeding shall have been filed in a court of appeals, as provided in subsection (b) of this section, the Commission may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it under the provisions of this chapter.

(b) Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such pro-

ceeding may obtain a review of such order in the court of appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of Title 28. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which if supported by

substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 346 and 347 of Title 28.

(c) The filing of an application for rehearing under subsection (a) of this section shall not, unless specifically ordered by the Commission, operate as a stay of the Commission's order. The commencement of proceedings under subsection (b) of this section shall not, unless specifically ordered by the court, operate as a stay of the Commission's order. June 21, 1938, c. 556, § 19, 52 Stat. 831; June 25, 1948, c. 646, § 32(a), 62 Stat. 991; May 24, 1949, c. 139, § 127, 63 Stat. 107; Aug. 28, 1958, Pub.L. 85-791, § 19, 72 Stat. 947.

APPENDIX E

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

ABANDONMENT-CERTIFICATES — DIRECT-SALE CONTRACTS — DECLARATORY ORDER — EMERGENCY-GAS SUPPLY — JURISDICTION — PUBLIC INTEREST — SERVICE — TARIFFS — TRANSPORTATION IN INTERSTATE COMMERCE

Before Commissioners: JOHN N. NASSIKAS, *Chairman;* ALBERT B. BROOKE, JR., and PINKNEY WALKER

UNITED GAS PIPE LINE COMPANY

Docket Nos. RP 71-29, RP 71-120, RP 71-99

OPINION No. 606

OPINION AND DECLARATORY ORDER FINDING JURISDICTION, REMANDING SOME ISSUES TO EXAMINER, DISMISSING MOTION TO SEVER, DENYING AND DISMISSING MOTIONS TO ENLARGE SUSPENSION PERIOD, AND DISMISSING PETITION FOR DECLARATORY ORDER TO INTERPRET CONTRACT TERMS

(Issued October 5, 1971)

PER CURIAM:

HISTORY OF PROCEEDINGS

This proceeding was commenced by the filing on October 26, 1970, of a petition in Docket No. RP 71-29 by United Gas Pipe Line Company (United) requesting a declaratory order from this Commission finding the curtailment plan to be implemented by United in the event of impaired deliveries was consistent and in keeping with Section 12 of

the General Terms and Conditions of United's FPC Gas Tariff, First Revised Volume No. 1.[1] United projected a shortage of gas supplies during the 1970-1971 heating season and possibly thereafter which would not be adequate to meet the contract demands of all of its customers. Its curtailment program initially designated three usage categories (later amended to five categories) for purposes of priority of service or its converse, curtailment. These were, in order of the lowest priority and curtailed first — gas used for industrial purposes, including gas to generate electricity for later industrial use; the second lowest category — gas used to generate electricity consumed for domestic customers; and the highest order of priority — gas used by domestic customers.

Motions and answers were filed objecting to United's petition and asking that we decline to render a declaratory order or that we deny United's petition.[2] The Commission recognized the urgency of the questions presented because the heating season had already begun and because United had placed its curtailment program into effect on November 1, 1970, as it was obligated to do. On December 10, 1970, we ordered hearings to commence on December 21, 1970, and the purpose of the hearings was:

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[1] These provisions are found in United's filed tariff as Original Sheet No. 71 issued on December 1, 1954, effective August 1, 1954, and First Revised Sheet No. 72 issued on October 31, 1969, effective December 16, 1969. United amended its petition on November 20, 1970, requesting the Commission to order Mobile Gas Service Corp. to cease circumventing United's curtailment plan by reselling its allocated volumes to other customers of United.

[2] Mobile Gas Service Corporation (Mobile) filed a motion on November 10, 1970; Texas Eastern Transmission Corporation (Texas Eastern) filed an answer to United's filing on November 23, 1970; Stauffer Chemical Company (Stauffer) protested United's petition on November 25, 1970, and requested that the Commission reallocate gas deliveries under a more constructive and reasonable plan.

> * * * to resolve the questions presented in United's petition, its amendment thereto and the motions, answers, and protests which those two documents filed by United have engendered, and to determine (a) the proper interpretation of Section 12 of the General Terms and Conditions of United's FPC Gas Tariff and whether the curtailment program placed into effect by United on November 1, 1970, is in accordance therewith, (b) whether it would constitute undue discrimination under the provisions of the Natural Gas Act if a curtailment program placed into effect on United's system did not apply equally to the jurisdictional and direct sales customers of United and (c) whether it would be appropriate for the Commission at this time to consider the question of reallocation of United's total gas supply among all of United's customers, and if so, on what basis should such reallocation be made * * *.

United thereafter proposed an interim settlement which was accepted by all parties except Monsanto Chemical Corporation. The Commission approved the settlement on December 29, 1970.[3] In light of the emergency situation which confronted United, we approved the interim curtailment plan to remove uncertainty of operation on United's system during the winter heating season which was then in progress. This settlement tended to meet the objections of the interveners, provided for cooperation in the curtailment program through March 31, 1971, and provided that United would attempt to make spot purchases of gas, if possible. It also resolved temporarily the dispute between United and Mobile, the subject of United's November 10, 1971 amendment to its petition. All legal issues were reserved to be determined at a later date; interveners did

[3] The Commission denied Monsanto's petition for rehearing of the settlement approval on February 26, 1971. Monsanto's appeal to the United States Court of Appeals for the District of Columbia is pending in Docket No. 71-1306.

not admit the curtailment plan was either authorized or required. They agreed not to seek injunction or damages for curtailments through that period but did not waive the right to seek recovery of capital costs for alternative fuel facilities incurred prior to March 31, 1971. Hearings were recessed on December 22, 1970, and, with agreement of all parties, hearings did not reconvene until March 31, 1971.

Since that order of December 10, 1970, which set the proceedings for hearing, the 1970-1971 heating season has passed, and United filed, on February 22, 1971, a supplemental petition for declaratory order in Docket No. RP71-29 to provide for curtailments beginning April 1, 1971, for the 7-month summer season. This supplemental petition requested sanction of an extension of United's curtailment program from April 1, 1971, to at least through October 31, 1971, and altered the method of calculating curtailments to meet the system's summer needs. United amended its February 22, 1971, supplemental petition on June 14, 1971, to correct errors in the initially filed summer curtailment program. On March 10, 1971, United filed a Second Revised Sheet No. 72 to become effective June 2, 1971. This sheet was, among other things, intended to clarify the intent of Section 12.1 of United's tariff. Our order of May 18, 1971, suspended these revisions until June 22, 1971, and consolidated that clarification herein.[4]

United filed proposed tariff revisions in Docket No. RP71-120 to become effective on November 1, 1971, to cover curtailments for the 1971-1972 winter heating season and for

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[4] The addition of a new Section 12.3 to United's General Terms and Conditions to eliminate United's obligation to reduce a buyer's demand charge by virtue of proration was at that time consolidated for hearing in another proceeding, Docket No. RP71-41.

an indeterminate period thereafter.[5] This recent filing revises the impairment of deliveries provisions in Section 12 of the General Terms and Conditions portion of United's tariff by adding two new categories of curtailment priorities. It also provides that no payments or credits for substitute fuels will be made or given by United in the event of curtailment, and prohibits resale customers from offsetting the effects of United's curtailments by purchasing valley gas available from another customer of United.

All parties rested on July 27, 1971, after 43 days of hearings; initial briefs were filed August 27, 1971, and reply briefs were submitted September 20, 1971. On August 23, 1971, this Commission granted a motion for omission of the intermediate decision to prevent delay in resolving the important questions raised by United and interveners in these proceedings. It is important that we now determine, before the next winter heating period commences, the initial and crucial question in this proceeding, whether this Commission has the authority to accept and approve tariff filings for curtailment plans affecting both sales for resale and direct sales when that curtailment plan is necessitated by the public interest. We now find and conclude in the affirmative.

Other issues to be determined by these hearings, as set forth in our December 10, 1970, order, such as those relating to the implementation of United's curtailment plan pursuant to Section 12 of United's tariff, and relating to whether the Commission should consider reallocation of United's

[5] United filed these sheets on May 17, 1971, pursuant to our Order No. 431, in Docket No. R-418. They are designated First Revised Sheet No. 71, Third Revised Sheet No. 72 and a new sheet, Original Sheet No. 72-A. This filing was designated as Docket No. RP71-120 and in part consolidated herein and suspended for one day to November 2, 1971, by a May 28, 1971, order in these proceedings.

total gas supply, together with any other unresolved questions raised by United's petitions and the answers thereto, we shall remand to the Presiding Examiner for his recommended decision thereon.

A word is in order about another pending United proceeding in Docket No. CP71-89. There United filed an application on October 1, 1970, requesting a certificate of public convenience and necessity pursuant to Section 7(c) of the Natural Gas Act to continue operating certain facilities and to continue service heretofore treated as local and intrastate in character. These facilities are known as the New Orleans Division of United's system. A central question in that proceeding is whether those facilities are interstate in character and subject to our jurisdiction. To the extent, if any, they are found to be so, our ruling in this proceeding concerning the Commission's jurisdiction over curtailment programs will apply to volumes transported through those facilities.

JURISDICTION AND CURTAILMENTS

Several parties assert that the Commission has no jurisdiction to allocate gas in curtailment proceedings in a manner inconsistent with existing direct sale contracts. It follows from this argument, that if the gas supply is insufficient to meet the contracted requirements of all consumers, then the direct industrial users might get their gas first, leaving only the remainder to the resale consumers — made up of households, hospitals, schools, public buildings, and industrial and commercial establishments in all states served by the jurisdictional pipelines.

We find herein, based upon the Natural Gas Act and the precedents thereunder, that this Commission has the plenary authority to allocate the gas supply of jurisdictional

pipelines to all customers, including direct industrial users, regardless of any contracts with individual customers, direct or resale.

A review of the record in these proceedings constrains us to render a declaratory order pursuant to United's petition filed October 26, 1970, as amended. Present here are two principal criteria guiding the policy in favor of rendering a declaratory judgment: a judgment will serve a useful purpose in clarifying and settling legal relations and issues and will terminate and afford relief from the uncertainty, insecurity, and controversy giving rise to the proceeding. *Panhandle Eastern Pipe Line Co.* v. *Michigan Consolidated Gas Co.*, 177 F.2d 942, 944 (CA6, 1949).

At the outset we note that direct industrial sales cannot be made without a certificate from this Commission and that the Commission must determine whether the public convenience and necessity is met in light of the proposed terms of that sale.[6] In addition, the Commission, pursuant to Section 7(b), must determine whether a direct sale — or any sale — should be abandoned because of depleted gas supply or because it no longer meets the public convenience or necessity. The price at which the direct industrial sale is made is thus material in both certificate and abandonment proceedings. Short of considering rates as a factor in all certification or abandonment proceedings, the Commission does not assert jurisdiction to determine the rates at which direct sales to industrial customers will be made, but it does not follow that we have no jurisdiction over the transportation and deliveries to direct customers for the following reasons.

Our jurisdiction to oversee the implementation of curtailment plans derives, *inter alia*, from Sections 1(b) and 4

[6] *Panhandle Eastern Pipe Line Co.* v. *F.P.C.*, 232 F.2d 467, 471 (CA3, 1956).

of the Natural Gas Act. Section 1(b) states that "The provisions of this act shall apply to the transportation of natural gas in interstate commerce * * *."[7] Several parties claim that language within Section 1(b) limits our jurisdiction here, "* * * this act shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale * * * but shall not apply to any other transportation or sale * * *." This is urged as indicating that our jurisdiction does not extend to the sales of gas for direct use and thus, *a fortiori,* does not extend to curtailments of gas sold for direct use. We agree Section 1(b) limits our jurisdiction over the rate at which direct sales are made, *F.P.C.* v. *East Ohio Gas Co.,* 338 U.S. 464 (1950); *City of Hastings, Nebraska* v. *F.P.C.,* 221 F.2d 31, 39 (CADC, 1954), *cert. denied,* 349 U.S. 920 (1955), but in exercising our certificate jurisdiction or jurisdiction over the abandonment of direct sales, we must and do consider the rates at which direct sales are made. However, Section 1(b) also provides us with jurisdiction over the transportation of gas in interstate commerce, and there lies our power and duty to act at this time of curtailments. Any transportation by a jurisdictional pipeline is in interstate commerce, including the transportation and sale of gas to a direct industrial user. *Panhandle Eastern Pipe Line Co.* v. *F.P.C.,* 232 F.2d 467 (CA3, 1956), *cert. denied,* 352 U.S. 891 (1956).

Panhandle Eastern Pipe Line Co. v. *Public Service Commission of Indiana,* 332 U.S. 507, 516-517 (1947), is cited by some parties for the proposition that Congress did not intend this Commission to regulate direct sales for consumptive use. But the case in no uncertain terms stands for the opposite conclusion. There Panhandle challenged the Public Service Commission's authority to require the filing

[7] 52 Stat. 821 (1938), 15 U.S.C. Sec. 717(b).

of information to regulate direct sales. To support its position, it argued that state regulation of direct sales would result in a conflict among states on the issue of curtailments during periods of gas shortage. The United States Supreme Court affirmed a ruling upholding the Indiana Commission's authority to regulate certain aspects of direct sale; but in affirming, the Supreme Court recognized its holding was not the broad stroke delimiting all forms of Federal regulation concerning direct sales that those opposing our exercise of jurisdiction now argue. There the court merely found, "* * * the states are not made powerless to regulate the sales in question by any supposed necessity for uniform national regulation * * *." (332 U.S. at 523-4). In so finding it did not find conversely that this Commission is powerless in the area.[8] The Court specifically recognized this Commission's authority to act on a national level in instances relating to direct sale curtailments (332 U.S. 523):

> Appellant also envisages conflicting regulations by the commissions of the various states * * * particularly in relation to *curtailment of service* * * * if such conflicts should develop, the matter of interrupting service is one largely related, as appellees say, to *transportation* and thus within the jurisdiction of the Federal Power Commission to control in accommodation of any conflicting interests among various states. [Footnote omitted; emphasis supplied.]

Curtailments thus do not relate to rates, they relate to transportation wherein our jurisdiction here lies. "And throughout the Act 'transportation' and 'sale' are viewed as separate subjects of regulation." *F.P.C.* v. *East Ohio Gas Co.*, 338 U.S. 464, 468 (1950).[9] In *South Georgia Na-*

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[8] *Cf. F.P.C.* v. *East Ohio Gas Co.*, 338 U.S. 464, 473-4 (1950).

[9] For further cases on this point see *Panhandle Eastern Pipe Line Co.* v. *F.P.C.*, 359 F.2d 675, 682-3 (CA8, 1966).

tural Gas Co., 23 FPC 795 (1960), we said, "Section 1(b) of the Act * * * states that the Commission shall have jurisdiction over the 'transportation' of gas for direct sales, but not over the direct 'sales' themselves." 23 FPC at 796. Thus, while we generally do not assert jurisdiction to determine the *rates* at which direct sales are made (except in certificate or abandonment proceedings), we possess authority to regulate the *volumes* of gas transported for direct sale.[10]

It is argued that lack of rate jurisdiction over direct sales precludes our exercising jurisdiction over tariff provisions affecting direct sales. Among the cases cited for this argument is *Colorado Interstate Gas Co.* v. *F.P.C.*, 185 F.2d 357 (CA3, 1950). Unlike the situation in *Colorado*, the curtailment plans, as set out in this order, do not directly apply to rates and charges. Moreover, the court in *Colorado* relied upon *Panhandle Pipe Line Co.* v. *Public Service Commission of Indiana, supra*, for its holding but, as noted above, the Supreme Court in *Panhandle* specifically said that the exceptional situation created by curtailments would vest authority in this Commission to act. Also on this point, the holding in *Granite City Steel Co.* v. *F.P.C.*, 320 F.2d 711 (CADC, 1963) is not relevant and material to the question of our *jurisdiction* to approve and authorize curtailment plans because it concerned, instead, only the question of reallocating volumes to provide gas for new customers pursuant to Section 7(a) of the Act.

This jurisdiction over the transportation of gas in interstate commerce is and must be of a continuing nature, otherwise our jurisdiction over the direct connection in the first instance would be insignificant, *South Georgia Natural*

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[10] See *Panhandle Eastern Pipe Line Co.* v. *Public Service Commission of Indiana*, 332 U.S. 507, 516 (1947). *Panhandle Eastern Pipe Line Co.* v. *F.P.C.*, 232 F.2d 467, 471-2 (CA3, 1956), *cert. denied*, 352 U.S. 891 (1956).

Gas Co., 23 FPC at 796. Nor does this continuing jurisdiction apply only to Section 7 issues alone, for it is axiomatic that whenever our jurisdiction applies in the first instance pursuant to Section 1(b) of the Act, each of the Act's other provisions may be utilized to carry out the regulatory purposes of Congress for which jurisdiction was to initially attach; except, and only except, to the extent limited by Section 1(b) of the Act. The general object and purposes for which the Act was passed includes the desire to eliminate and prevent unfair, unreasonable or discriminatory service to the gas consuming public. This cannot be accomplished without full authority to rule upon a curtailment plan; a matter toward which our authority over the transportation of gas for resale or direct sale must be aimed. Our transportation jurisdiction does not relate solely to arrangements whereby gas is transported for another pursuant to a transportation agreement but it relates also to the transportation of gas for direct sale by the pipeline, *F.P.C.* v. *East Ohio Gas Co.*, 338 U.S. 464, 468 (1950); *Panhandle Eastern Pipe Line Co.* v. *F.P.C.*, 232 F.2d 467, 471-2 (CA3, 1956), *cert. denied*, 352 U.S. 891 (1956).

Curtailment situations are not new. Shortly after World War II, gas was not available in quantities equal to the demands of firm customers. Questions concerning supply allocation arose between Panhandle Eastern Pipe Line Company and its customers. This Commission took an active part in assuring fair application of gas allocations. We required Panhandle to file "proposed rules and regulations to govern curtailment and interruption of gas service." Following hearings on the proposals filed, and voluntary agreement, emergency rules for curtailment became embodied in Panhandle's rate schedules. *City of Detroit* v. *Panhandle Eastern Pipe Line Co.*, 5 FPC 983 (1946). These

rules affected direct customers of Panhandle as well as wholesale customers.[11]

The outcome of the litigated cases that followed Panhandle's curtailment left no doubt that our authority extends to allocating or approving the allocation of volumes of gas during gas shortage situations. We ruled on precisely this issue with respect to contracts filed pursuant to Section 4 of the Act in *City of Detroit* v. *Panhandle Eastern Pipe Line Co.*, 6 FPC 196, 203-4 (1947). In *Michigan Consolidated Gas Co.* v. *F.P.C.*, 203 F.2d 895, 900 (CA3, 1953) the court said, "The problem of the allocation of service to various customers is one which calls for judgment within the Commission's peculiar and expert competence." In another case, *Michigan Consolidated Gas Co.* v. *Panhandle Eastern Pipe Line Co.* 226 F.2d 60 (CA6, 1955), *cert. denied* 350 U.S. 987 (1956), the court affirming a lower court's refusal to assume jurisdiction of a claim for damages under a gas contract breached, of necessity, due to a gas shortage, said (226 F.2d at 70):

> • • • The problems • • • involved • • • "intricate problems of service as between different users and different geographical sections" and required for their decision the technical understanding and expert knowledge of the Commission. The transactions • • • relevant involve eight states and great metropolitan areas. The problems of changing industrial conditions and growing needs for natural gas both territorially and otherwise are so extensive they do not lend themselves in the first instance to hearing before a court and require the expertise of the Commission.

Similarly, in *Michigan Consolidated Gas Co.* v. *Panhandle Eastern Pipe Line Co.*, 173 F.2d 784, 789 (CA6, 1949) the

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[11] The following year voluntary agreements could not be reached but similar rules for curtailments were again issued. *City of Detroit* v. *Panhandle Eastern Pipe Line Co.*, 6 FPC 196 (1947).

court said, "* * * the operaton of exsting facilities in such manner as is sought may * * * result in changes of service to other customers without undue preference or undue discrimination within the power of the Commission to control * * *."

This latter language pinpoints the need for our authority to act here. A system-wide gas shortage reduces volumes transported and necessarily causes a change in the operation of existing facilities that serve customers in several states in several regions; each with unique climatic, geographic and economic characteristics, and can affect service to homes, schools, hospitals, and other institutions. Without our exercising plenary jurisdiction over all phases of curtailment, any of the pipeline customers might be the object of undue discrimination stemming from some customers taking deliveries of gas for direct industrial consumption in one state in such quantities as to impair deliveries to cities and towns in the same or other states, with uncontrolled disruption resulting therefrom.

Our continuing control over the transportation of all gas transported or sold, whether for resale or direct sale for consumption, to carry out the basic intent of the Act, insofar as we are not specifically precluded by Section 1(b), runs in part to preventing the type of discriminatory practices set forth in Sections 4(b) and 5(a) of the Natural Gas Act.[12]

Those sections of the Act cover a broader range than simply the regulation of rates or charges. While that portion of Section 4(b) of the Act prohibiting "undue preference or advantage * * * or * * * undue prejudice or disadvantage" or that portion which does not permit any pipe line to "maintain any unreasonable difference in rates,

[12] 52 Stat. 822, 823, (1938), 15 U.S.C. Sees. 717c, 717d.

charges, service, facilities, or in any other respect * * *", may be applied to prevent the evasion of "just and reasonable rates," they may be applied equally to prevent discrimination in "service," which in curtailment cases, as here, may not be quantifiable into rates. In such instances, our regulatory power granted in Sections 4(b) and 5(a) of the Act would be unduly restricted were we unable to oversee all curtailments affecting service. The Supreme Court has specifically pointed to that language within Section 5(a) of the Act relating to the Commission's authority to correct "unjust, unreasonable, unduly discriminatory, or preferential" activities or contracts and said, "It is clear that contracts covering direct industrial sales come within that * * * clause of Section 5(a)." *Panhandle Eastern Pipe Line Co.* v. *F.P.C.*, 324 U.S. 635, 647 (1945). Thus, it is our duty to determine whether the practices forbidden in Section 4(b) or 5(a) of the Natural Gas Act in fact have occurred and to prevent any such practices from occurring or continuing to occur pursuant to United's filed tariff.

To carry out this mandate, a uniformly applied curtailment plan is required; one that necessarily involves several states would be virtually uncontrollable at the state regulatory level. Operating factors such as pressures at various system points, demands, and supplies are all relevant to a curtailment plan's operations, and jurisdiction to oversee all these factors is required — the states are powerless to control sufficiently and individually all these factors to provide fair service to consumers in each of their states and in other states. We must act, and our action must include direct sales, or else no effective control over curtailments will be possible.

In the past, when the extent of our jurisdiction to act has come into issue, the answer has required a return to the basic purposes of the Act. Many times stated, it is in the

intent to give full protective coverage to the consumer. *Atlantic Refining Co.* v. *P. S. C. of New York*, 360 U.S. 378 (1959). Courts have often found it necessary in protecting the public interest that we rule in ways affecting direct sales. See *Panhandle Eastern Pipe Line Co.* v. *F.P.C.*, 359 F.2d 675, 682-3 (CA8, 1966). Full protection is obviously lost unless we oversee these curtailment plans in their entirety. If we refused jurisdiction here on the grounds that all regulation affecting direct sales in any manner is forbidden by Section 1(b) of the Act as a matter of local concern, comprehensive regulation of United's operations during curtailments would be impossible, since a uniformly fair plan coordinated by the State commissions could not reasonably be expected to be overseen by them. This is precisely the type of problem which the Natural Gas Act was intended to alleviate. Thus, our action here does not usurp state regulatory functions; it undertakes to do that which the states acting individually cannot effectively do and thus complements state regulation.

It is argued that even assuming the Commission has full jurisdiction over curtailment plans, the curtailment program must still be consistent with contractual obligations. We do not agree. Our determination concerning the curtailment plan must be undertaken without regard to the many and various contractual obligations of United. In considering the curtailment plan presented by United, we must appraise it to determine whether it is a proper and equitable approach in view of the anticipated extent of the curtailment, the relative interests and positions of the customers and others affected, and the overall gas supply situation. It is well settled that pipelines and other parties cannot by contract avoid their public interest obligations once our jurisdiction attaches. *California* v. *Lo-Vaca Gathering Co.*, 379 U.S. 366 (1965); *Sunray Mid-Continent Oil Co.* v. *F.P.C.*, 364 U.S. 137 (1960).

The best example of why we cannot provide that curtailment programs meet all contractual obligations is the case before us. United's contracts provide generally that gas for domestic consumers has the highest priority and that remaining gas shall be prorated by United among its other customers. No provision is made in these contracts for priorities based upon other superior needs or purposes that may be valid and required by the public interest. For example, United's own proposed priority categories for industrial users, or for users of gas as a raw material, might be required by the public interest. Other priority categories might also be valid, such as gas used for national defense purposes. Thus, merely because United's direct sale contracts fail to provide adequately for all situations related to service in the public interest — which we are bound to protect — should not and must not limit our authority here. Nor can it be supposed that the parties or the Commission should foresee at the time of certificate approval all possible public interest priorities that might supersede the contractual obligations to deliver gas.

There is no doubt that the present gas shortage has created new circumstances giving rise to the need to consider more carefully whether the sales of a pipeline are fully compensatory so as to enable the continued efficient and economic operation of pipelines in all areas, financial as well as operative, and to better enable the acquisition of gas supplies so desperately needed. Given these new circumstances, we must be free to act on a broad geographic front across state lines to mitigate the interstate effect of gas shortages consistent with Congress' intention "* * * to create a comprehensive and effective regulatory scheme, complementary in its operation to those of the states and in no manner usurping their authority. * * *" *Panhandle*

Eastern Pipe Line Co. v. *Public Service Commission of Indiana*, 332 U.S. 507, 520 (1947).

Some parties have argued that we may consider curtailment programs only under Section 7(b) of the Act as proposals to abandon service. We do not find that when curtailments are required due to a gas shortage that it is necessary to file a request for abandonment of service pursuant to Section 7(b) where, as here, the service reduction or stoppage foreseen is one of a temporary nature and where there is expectation that prior service levels will be resumed when gas supplies are available. We agree with our previous holdings in *City of Detroit* v. *Panhandle Eastern Pipe Line Co.*, 6 FPC 196, 203 (1947), that we have jurisdiction and authority under Sections 4 and 5 of the Act to consider, approve, or establish curtailment programs as the circumstances may require in assuring reliability of service to the public served by interstate pipeline companies.

We could, if we so chose, amend, pursuant to Section 16 of the Act, our previous certificate orders relating to the transportation of gas by United for the sale to both resale and direct sale customers in order to provide for this emergency curtailment situation not foreseen at the time the orders were issued initially. We could prescribe service criteria for each individual direct customer under our continuing certificate authority that might not afford each direct customer precisely the same treatment as all others as a result of varying circumstances and public interest considerations. Instead, we have chosen, as the means of administering curtailment plans, to require, pursuant to Section 4 of the Act, the filing of tariff sheets prescribing those plans and affording all interested parties an opportunity to be heard. Of course, this approach does not hinder our authority to grant emergency relief where special cir-

cumstances require it in the public interest.[13] These filings receive RP docket numbers because they relate to tariff changes, not necessarily to rate changes. Our Statement of General Policy in Docket No. R-418, Order No. 431, made clear our intent to approach curtailments in this manner. In our view, the filing of tariff provisions and providing hearings thereon will actually serve to reduce the opportunity for inequities between various individuals receiving gas from United.

On the other hand, it may be necessary to approve and order abandonment of service to various of United's direct or resale customers, should United's supply of natural gas be so depleted that the continuance of that service is unwarranted, or if the service or sale is no longer permitted by the public convenience or necessity. At a period when gas supplies are low, justification for the continuance of service may depend in part on whether such service makes a compensatory contribution to the pipeline so as to enable continued unimpaired operations. *Cf. South Georgia Natural Gas Co.*, 23 FPC 795, 797 (1960).

CATEGORY V

We now turn to United's tariff changes filed May 17, 1971, in Docket No. RP71-120, proposed to become effective for the 1971-1972 heating season. United submitted three proposed tariff sheets pursuant to our Order No. 431 that are to become part of its First Revised Volume No. 1, consisting of First Revised Sheet No. 71, superseding Original

[13] See two orders issued July 2, 1971, in these dockets titled; Order Deferring Final Ruling On Motion For Interlocutory Order And Providing For Evidentiary Hearing, and Order Authorizing And Directing Interim Enforcement Of Curtailment Program Pending Final Determination Of Issues. See also our order herein issued July 28, 1971; titled Order Denying Motion For Reconsideration.

Sheet No. 71; Third Revised Sheet No. 72, superseding Second Revised Sheet No. 72; and Original Sheet No. 72-A.

These sheets would revise the existing Impairment of Deliveries provision contained in Section 12 of the General Terms and Conditions of United's tariff. They provide in Section 12.1 for a proration of impaired deliveries by setting out two new categories of service priority: Category II involving "process" gas and a new "lowest priority" Category V for power plant and industrial customers, whether served directly or indirectly by United, and paying a rate less than the applicable city gate jurisdictional rate at a 100 percent load factor in the same rate zone. The revised sheets also would prohibit curtailed customers from offsetting curtailments by obtaining gas from another supplier who obtains gas either directly or indirectly from United, and prohibit any customer of United from selling gas to anyone to offset gas curtailed. In addition, they would add to Section 12.3 a statement that no payments or credits for substitute fuels will be made or given in the event of curtailment.[14] United's filing in this docket did not request a declaratory order but was filed pursuant to our Order No. 431.

Most of the twenty-nine initial briefs that were filed in this proceeding have objected to portions of these new tariff sheets filed by United, particularly that portion respecting the establishment of the low priority Category V. Besides the initial question of whether the Commission may exercise plenary jurisdiction over curtailment plans (resolved above), United's filing of May 17, 1971, raises, among others, the question of whether the Commission should approve

[14] Section 12.3, entitled Demand Charge Adjustment and Substitute Fuel Payment Obligations, was first proposed on March 10, 1971, on Second Revised Sheet No. 72.

curtailment plans that essentially define a class of customers for curtailment purposes as those who pay noncompensatory rates.

We find that the tariff language proposing Category V should be rejected for the reasons herein stated. United must file by November 2, 1971, new tariff sheets eliminating that language concerning Category V and realigning all customers into the four remaining categories for the Examiner's and our consideration on the merits. United attempts to justify its Category V upon a need to obtain revenues from its sales which are compensatory. This, it says, would help remedy the shortage by affording it an opportunity to spend more money to enable it to obtain new reserves. We find that there is little correlation between the need to curtail deliveries because of inadequate gas reserves and the degree of compensation received for the sale of the limited gas supplies which are available. If United believes certain sales are adversely affecting its ability to serve its customers and its ability to serve the public interest, it should instead request authority to abandon those sales pursuant to Section (b), regardless of any contracts affected.

SUBSTITUTE FUEL CLAUSE ADJUSTMENTS

We should now also consider questions before us regarding the substitute fuel clauses proposed in Section 12.3 of United's tariff. These questions first came before us when United filed, on March 31, 1971, in Docket No. RP71-99, a petition for a declaratory order requesting we issue an order determining and limiting United's obligations under substitute fuel clauses in five of its contracts with three customers purchasing gas under those contracts from

United.[15] That docket was consolidated with the other dockets in this proceeding by order of September 15, 1971. We said the issues raised therein are questions of law not requiring an evidentiary hearing and are similar to the other issues in this proceeding.

Similar questions arise in Docket No. RP71-120 as a result of United's filing Original Sheet No. 72-A which, in part, added to Section 12.3 of the General Terms and Conditions of its tariff the langauge, "* * * nor shall Seller be obligated to pay or credit such customers any sums with respect to substitute fuels burned by such customers during such a period of proration or interruption."

We decline to render a declaratory order in Docket No. RP71-99, and so dismiss United's petition, because it requests an interpretation of contract terms unnecessary in light of our action herein exercising jurisdiction over curtailment plans.

Implementation of the curtailment plan itself, pursuant to our procedures, would be an absolute defense for United against all claims for specific performance, damages, or other requests for relief under these contracts affected by curtailments that may be initiated in the courts. No additional tariff language like that proposed in Section 12.3 on Original Sheet No. 72-A is necessary to limit liability under contracts when agencies' orders, rules, or regulations authorize actions contrary to those contracts. In *Michigan Consolidated Gas Co.* v. *Panhandle Eastern Pipe Line Co.*, 173 F.2d 784 (CA6, 1949), the court refused to grant relief to Michigan Consolidated despite the existence of a contract between that Company and Panhandle. The court said (173 F.2d at 789):

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[15] Answers were filed by the three parties to the contracts: International Paper Company, Mississippi Power Company, and Mississippi Power & Light Company.

> The collateral relief prayed by Consolidated is also, in our judgment, beyond the jurisdiction of the court to order without interfering with the regulatory powers of the Commission. * * * We do hold that adequacy and impartiality of service, in the light of existing circumstances, is within Commission control. This must be so if control over rates means anything, since adequate service is a necessary concomitant in the fixing of reasonable rates. * * * If the Commission has no authority to order adequate service to customers, in view of all the conditions and circumstances involved, the basic purpose of the Natural Gas Act fails of realization. We can attribute to the Congress no purpose to withhold from the Commission control over services. The power to prevent preferences and discrimination both as between individuals and classes, carried with it by necessary and inescapable implication, authority to regulate service.

In a similar case, *Panhandle Eastern Pipe Line Co.* v. *Michigan Consolidated Gas Co.*, 177 F.2d 942 (CA6, 1949) the court found invalid a lower court's temporary injunction granted to prevent curtailment of gas delivery from Panhandle to its distributor Michigan Consolidated. In so ruling the court said (177 F.2d at 944-45):

> In the Detroit case we were of the view that the Commission had power to prescribe emergency service rules and regulations with respect to deliveries of gas by a pipe line company to a distributor without regard to contract requirements * * *.
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> * * * * *
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> * * * As we have already seen, it is within the Commission's power to regulate service by emergency orders without respect to contract obligations.

The Supreme Court recognized this principle in the *Permian Basin Area Rate Cases*, 390 U.S. 747, 784 (1968), saying, "* * * the Commission has plenary authority to limit

or to proscribe contractual arrangements that contravene the relevant public interests." See also *L.N. Jackson & Company* v. *Royal Norwegian Government*, 177 F.2d 694, 697 (CA2, 1949), stating, "For it is well settled that a contractual duty is discharged, in the absence of circumstances showing either a contrary intention or contributing fault on the part of the person subject to the duty, where performance is subsequently prohibited by an administrative order made with due authority by an officer of the United States. Restatement, Contracts § 458(b), 1932; Williston on Contracts, §§ 1938, 1939, Rev. Ed. 1938."

Therefore, the language in United's tariff precluding the operation of substitute fuel clauses when curtailments are properly implemented is unnecessary.

GAS CURTAILMENT OFFSET

United has proposed tariff language in Docket No. RP71-120 that would prohibit the purchase or sale of gas between a customer of United and another customer of United to offset gas curtailed by United. That language is:

> Furthermore, no customer so required to curtail will obtain gas to offset such curtailment from a supplier who obtains such offset gas either directly or indirectly from Seller, nor shall any customer of Seller sell gas to anyone to offset gas curtailed in accordance herewith.[16]

We reject this proposed language as beyond our jurisdiction to approve. Our jurisdiction over the disposition of natural gas ends when it reaches the hands of a nonjurisdictional person such as a distributor purchasing for resale. This language would in effect attempt to extend our jurisdiction over the disposition of gas by a local distributor, a matter within the province of the local regulatory body. We

[16] See United's Third Revised Sheet No. 72 and Original Sheet No. 72-A of its FPC Gas Tariff, First Revised Volume No. 1.

will of course consider the past and planned disposition of volumes by the customers when ruling upon allocations for the various customers, but after allocation among United's customers, we leave for the states or other local bodies the job to oversee the distribution of that gas by the customers at the local level. This proposed language is not an integral part of United's curtailment plan: the later disposition by one of United's customers of volumes sold by United, or the purchase by United's customers of gas originating from United, does not affect United's ability to limit the total volume of gas delivered by it. There is no showing that this proposed tariff language would have the slightest beneficial effect on the gas supply of a single customer of United.

PENDING MOTIONS

Also before us are four motions. One was filed on August 12, 1971, by Marquette Cement Manufacturing Company and Container Corporation of America (Marquette and Container Corp.) to sever for immediate consideration an issue regarding the validity of United's establishment of a new low priority Category V in its priority list for curtailments.[17] In the alternative, Marquette and Container Corp. asks that, if the Commission permits Category V to become effective, that it do so conditionally upon an express agreement by United to refund, if the Commission ultimately disapproves this category, the differences between the rates now paid under contract and the higher contract rates paid by any customer pursuant to a contract entered into as a result of this priority system. Four answers representing eight direct customers of United were filed in support of the motion. United opposes the motion.

[17] This Category consists of those customers, other than domestic, purchasing gas at the city gate 100% load factor zone rate.

In light of our disposition regarding Category V above, the motion of Marquette and Container Corp. is now moot and should be dismissed.

Two motions were also filed requesting enlargement of the suspension period of United's proposed tariff sheets which were filed May 17, 1971, in Docket No. RP71-120; one by Gulf States Utilities Co. on September 9, 1971, and one by New Orleans Public Service Inc. on September 13, 1971.[18] Gulf States also requests that we defer the effective date of United's tariff until 30 days after the Commission passes upon the issues. Mississippi Power & Light answered in support of these motions on September 15, 1971. Our disposition above regarding the propriety of Category V removes the most significant basis and reason for these two motions. In addition, we have previously stated in our Order of July 2, 1971, in these proceedings, which directed interim enforcement of the curtailment program, United should be required to carry out its filed curtailment plan pending a decision on the issues. We do not defer from that principle, and the motions must be denied.

A fourth motion, filed on August 13, 1971, by International Paper Company and Scott Paper Company seeks enlargement of the extension period of that portion of United's proposed tariff that would prohibit a customer from reselling gas to other United customers to offset gas curtailed by United.[19] This provision was filed by United in Docket No. RP71-120. Again, our action above moots this request and the motion should be dismissed.

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[18] Gulf States filed a follow-up motion for expeditious consideration on September 15, 1971.

[19] See United's Third Revised Sheet No. 72 and Original Sheet No. 72-A of its FPC Gas Tariff, First Revised Volume No. 1.

The Commission further finds:

(1) United Gas Pipe Line Company is engaged in the transportation and sale for resale in interstate commerce of natural gas and is a pipeline company and a "natural gas company" within the meaning of the Natural Gas Act, as heretofore found by the Commission in its order of November 10, 1942, in Docket No. G-232, 3 FPC 863.

(2) Plenary jurisdiction resides within this Commission to accept, modify, and/or approve the curtailment plans proposed by United Gas Pipe Line Company or any other jurisdictional pipeline company relating to gas transported both to resale and direct sale customers.

(3) The curtailment priority Category V set forth on the proposed Third Revised Sheet No. 72 should be rejected as being an improper provision in a curtailment plan.

(4) The proposed language on Third Revised Sheet No. 72 and Original Sheet No. 72-A stating, "Furthermore, no customer so required to curtail will obtain gas to offset such curtailment from a supplier who obtains such offset gas either directly or indirectly from Seller, nor shall any customer of Seller sell gas to anyone to offset gas curtailed in accordance herewith" should be rejected as implying an extension of Commission jurisdiction over the local distribution of gas.

(5) The petition for a declaratory order in Docket No. RP71-99 should be dismissed.

(6) It is necessary and appropriate in carrying out the provisions of the Natural Gas Act that the motion of Marquette Cement Manufacturing Company and Container Corporation of America, filed August 12, 1971, to sever and decide whether United's proposed curtailment priority classification, Category V, is proper, be dismissed.

(7) It is necessary and appropriate in carrying out the provisions of the Natural Gas Act that the motions of Gulf States Utilities Company, filed September 9, 1971, and of New Orleans Public Service Inc., filed September 13, 1971, to enlarge the suspension period for the effective date of United's proposed tariff sheets, First Revised Sheet No. 71, Third Revised Sheet No. 72, and Original Sheet No. 72-A, be denied.

(8) It is necessary and appropriate in carrying out the provisions of the Natural Gas Act that the motion of International Paper Company and Scott Paper Company filed August 13, 1971, for enlargement of the suspension period of a portion of United's proposed tariff, be dismissed.

(9) The motion for oral argument filed September 22, 1971, by the State of Louisiana, the Louisiana Municipal Association, and the Parish of Cameron, Louisiana, should be denied.

The Commission orders:

(A) Issues in these consolidated proceedings not here decided are remanded to the Presiding Examiner for his initial decision regarding the proper interpretation and implementation of United's proposed curtailment plans, and the reasonableness thereof as set forth in both its petition for declaratory order, as amended and supplemented, in Docket No. RP71-29, and its filing, as amended and supplemented, pursuant to our Order No. 431, in Docket No. RP71-120. Such initial decision should also include findings concerning the environmental impact of United's curtailments.

(B) The proposed language on Third Revised Sheet No. 72 relating to Category V, and the proposed language on Third Revised Sheet No. 72 and Original Sheet No. 72-A relating to the offsetting of curtailed gas, as quoted herein,

are rejected. United Gas Pipe Line Company shall file new proposed sheets by November 2, 1971, deleting that language from its tariff.

(C) The petition for a declaratory order filed by United Gas Pipe Line Company in Docket No. RP 71-99 is dismissed.

(D) The motion of Marquette Cement Manufacturing Company and Container Corporation of America is dismissed.

(E) The motions of Gulf States Utilities Company and New Orleans Public Service Inc. are denied.

(F) The motion of International Paper Company and Scott Paper Company is dismissed.

(G) The motion for oral argument by the State of Louisiana, the Louisiana Municipal Association, and the Parish of Cameron, Louisiana, is denied.

By the Commission.

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

CERTIFICATES — DIRECT SALE CONTRACTS — GAS SUPPLY — JURISDICTION — PUBLIC INTEREST — SERVICE — TARIFFS — TRANSPORTATION IN INTERSTATE COMMERCE

Before Commissioners: JOHN N. NASSIKAS, *Chairman;* JOHN A. CARVER, JR., ALBERT B. BROOKE, JR., PINKNEY WALKER, AND RUSH MOODY, JR.

UNITED GAS PIPE LINE COMPANY
Docket Nos. RP71-29, RP71-120, RP71-99

OPINION No. 606-A

OPINION AND ORDER DENYING REHEARING AND DENYING MOTIONS TO REOPEN RECORD

(Issued December 3, 1971)

Nine applications and petitions for rehearing and clarification of the Commission's Opinion No. 606 and Order issued October 5, 1971, have been filed by twelve intervenors in this proceeding.[1] In addition, the State of Louisiana, *et al.* has petitioned for a reopening of the record.

REQUEST FOR REHEARING AND MODIFICATION

The petitions requesting rehearing and modification do not convince us that rehearing should be granted or that

[1] In alphabetical order they are: Gulf States Utilities Company; International Paper Company; Louisiana Power & Light Company; Mississippi Power & Light Company; Mississippi Power Company; Mobile Gas Service Corporation, jointly with Mississippi Valley Gas Company, and Clarke-Mobile Counties Gas District; New Orleans Public Service Inc.; Olinkraft, Inc.; and State of Louisiana, jointly with Louisiana Municipal Association, and Parish of Cameron, Louisiana.

our Opinion No. 606 should be modified. Thus we view our orders in Opinion No. 606 and on rehearing here to be final and fully reviewable upon the matters decided therein.

Several petitioners contend the Commission erred in finding it has plenary jurisdiction over curtailment plans of jurisdictional pipelines.[2] No arguments not previously considered concerning our authority under the Natural Gas Act were raised by the petitioners except that the State of Louisiana claims that there is no express grant of authority in the Natural Gas Act permitting the Commission to allocate a jurisdictional pipeline's scarce gas supplies to even resale customers and says Commission action is "without the benefit of any undisputed authority or congressional standards."[3] That contention was settled adversely to Louisiana's position in *Panhandle Eastern Pipe Line Co.* v. *F. P. C.*, 232 F.2d 467 (3rd Cir. 1956), *cert. den.*, 352 U.S. 891 (1956). In that case the Commission refused to allow Panhandle to use its interruptible gas to make direct industrial sales instead of selling such gas to its resale customers. The court affirmed the Commission's order, holding that the Commission has the power under the Act to control all deliveries of gas so as to prevent Panhandle from discriminating against its existing customers. The court pointed out that although the States may fix the rates at which gas is sold to direct-sale customers, the State "* * * tribunals in turn have no warrant to interfere in the Commission's allocations" (232 F.2d at 473).

Our Opinion No. 606 made clear that the basis of our jurisdiction to act over curtailments, respecting not only

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[2] Gulf States Utilities Company, Louisiana Power & Light Company, Mississippi Power and Light Company, Mississippi Power Company, Mobile Gas Service, *et al.*, New Orleans Public Service Inc., and State of Louisiana.

[3] Mobile Gas Service Corp., *et al.*, also discuss this in their petition for rehearing.

resales but direct-sale customers as well, derives from Sections 1(b), 4, 5, 7, and 16 of the Natural Gas Act. Decisions in proceedings before the Supreme Court and other appellate courts, the history of natural-gas regulation during a previous period of curtailments, and the basic purposes and policies of the Natural Gas Act confirm this authority, as detailed in Opinion No. 606.

Mississippi Power Company argues that if curtailment plans do not directly apply to rates and charges they should not be a part of United's tariff. Our Regulations require the filing of additional information regarding the classifications and practices of a pipeline company affecting services as well as those affecting rates and charges,[4] and the Commission has authority to prevent undue discrimination. See *Panhandle Eastern Pipe Line Co.* v. *F. P. C.*, 324 U.S. 635, 647 (1945). The form of filing is not the controlling consideration.

Several petitioners[5] request a rehearing or clarification of our ruling and rationale finding as unnecessary, but permissible, United's proposed language regarding substitute fuel clause adjustments. All concur in our rejection of that language and in our dismissal of United's petition in Docket No. RP71-99, but object to our bases for doing so. In clarification, this Commission has the responsibility and the authority to protect all consumers from efforts by pipelines to grant preferences in service to particular customers or classes of customers in times when gas shortage precludes fulfillment of all contracts for delivery of gas. A claim of preference in service directly or, in the case of substitute fuel clauses, indirectly, cannot operate to deprive

[4] Sections 154.1 and 155.1 of the Commission's Regulations.

[5] Gulf States, International Paper, Mississippi Power & Light Company, Mississippi Power Company, Olinkraft, Inc., and State of Louisiana.

this Commission of authority to assure fair and equitable curtailment plans. The pipeline companies cannot be faced with the dilemma of providing nondiscriminatory service as ordered by the Commission and at the same time incur liability for breach of contracts which grant discriminatory preferences, directly or indirectly. Thus, the Commission's authority to preclude undue preferences and discriminations in service operates to preempt any contract provisions inconsistent with the exercise of that authority as not being in the public interest.

International Paper argues that no question is involved of specific relief under the substitute fuel adjustment clauses in United's contracts and that therefore the cases relied upon by the Commission are inapposite.[6] International Paper misconstrues our purpose for the citations. They serve to point out that this Commission has the authority to issue orders (such as orders approving a curtailment plan) to carry out the purposes of the Natural Gas Act regardless of existing contractual commitments (such as direct sales commitments) of the natural-gas companies subject to our jurisdiction. While those cases are related to contracts involving sales for resale, we believe, as Opinion No. 606 made clear, that the principle they stand for is equally applicable to direct sales. *Panhandle Eastern Pipe Line Co.* v. *F. P. C.*, 324 U.S. 635, 647 (1945).

CONSIDERATION OF OTHER ISSUES

Louisiana asks that the proceedings be reopened for receipt of further evidence to determine whether United either deliberately or negligently brought its systemwide

[6] *Consolidated Gas Co.* v. *Panhandle Eastern Pipe Line Co.*, 173 F.2d 784 (6th Cir. 1949); *Panhandle Eastern Pipe Line Co.* v. *Michigan Consolidated Gas Co.*, 177 F.2d 942 (6th Cir. 1949); and *Permian Basin Area Rate Cases*, 390 U.S. 747, 748 (1968).

gas shortage upon itself. This question was already briefed by the parties and the question was remanded with other issues to the Examiner for his decision.

Louisiana also asks us to specify that the remand to the Examiner be broadened to include issues raised in Louisiana's reply brief concerning whether United's curtailment classifications should also distinguish between full and partial requirements customers and whether they should distinguish between localities within Louisiana and localities elsewhere. These issues are questions relating to the propriety and implementation of United's curtailment plan — questions which were specifically remanded to the Examiner for his decision.[7] The arguments of Louisiana are thus available to the Examiner for his consideration.

Louisiana further requests that the remand be broadened to consider whether this Commission has abused its discretion in approaching the national gas shortage on a pipeline-to-pipeline basis rather than upon a nationwide basis which would permit consideration of equities between gas-producing States and gas-consuming States, and whether the failure to conduct a nationwide allocation study to allocate gas between States is prejudicial to Louisiana localities. Without reaching the question of the extent of our jurisdiction to allocate the gas supply on a nationwide basis or after a nationwide allocation study, we have determined that the proper scope of this proceeding is that set forth in Opinion No. 606.

Louisiana additionally asks that the record be reopened pursuant to our direction to the Examiner in Opinion No.

[7] Louisiana requests that official notice be taken of its appendices to its reply brief. Because we leave for the Examiner to consider the relevance of Louisiana's contentions, we believe he should rule upon that request since he will be better able, at this time, to assess their materiality and relevance to these proceedings.

606 to make findings concerning the environmental impact upon the health of Louisiana residents of United's curtailments. Louisiana avers that presently the record evidence is limited to the economic impact of curtailments. Louisiana's request is more properly directed to the Examiner who now has the proceedings before him as a result of our remand in Opinion No. 606 of the issues not there decided.

Olinkraft, Inc., notes that our Opinion No. 606 did not correctly state its position regarding the interim settlement approved on December 29, 1971. To the extent that the transcript references cited by Olinkraft indicate a contrary position, we so recognize that as Olinkraft's position at that time.

The Commission finds:

The assignments of error and grounds for rehearing set forth in the applications filed by the above-named petitioners present no facts or legal principles which would warrant any change in or modification of the Commission's Opinion No. 606 and accompanying order of October 5, 1971, except as that Opinion has been clarified above.

The Commission orders:

The applications for rehearing of Opinion No. 606 filed by the above-named petitioners are denied.

By the Commission.
Commissioner Carver dissenting filed a separate statement appended hereto.

(Seal)

KENNETH F. PLUMB,
Secretary.

UNITED GAS PIPELINE COMPANY

DOCKET NOS. RP 71-29, RP 71-120, RP 71-99

(Issued December 3, 1971)

CARVER, Commissioner, *dissenting:*

By reason of absence, I did not participate in Opinion 606. I dissent to the order denying rehearing principally because the Commission has passed up an opportunity to correct some of the extravagances of jurisdictional assertions therein, a deficiency not cured by the circular statement that ". . . we have determined that the proper scope of this proceeding is that set forth in Opinion 606."

I continue in the conviction, expressed principally in dissenting statements over the past years, that the Natural Gas Act and the Federal Power Act delimit this Commission's jurisdiction according to a fair reading of their terms. See *Florida Power & Light Company,* Docket No. E-7210, 37 FPC 544, March 20, 1967, at p. 556; *Algonquin Gas Transmission Company, et al.,* 37 FPC 1128, June 27, 1967, at p. 1146; *Ohio Power Company, et al.,* 38 FPC 881, November 3, 1967, at p. 890; *Alabama-Tennessee Natural Gas Company, et al.;* 38 FPC 1069, November 30, 1967, at p. 1082; *Hugoton Production Company,* 41 FPC 490, April 17, 1969, at p. 504; *William Harvey Denman, Trustee, et al* v. *J. M. Huber Corporation,* 42 FPC 164, July 23, 1969, at p. 175; Reliability of Electric and Gas Service, Docket No. R-405, Policy Statement, Notice of Investigation and Proposed Rulemaking with Respect to Developing Emergency Plans, 44 FPC ....., November 4, 1970; *Arkansas Louisiana Gas Company,* Docket No. RP 71-122, Order Granting Emergency Modification of Curtailment Plan Pending Final Commission Decision, issued November 30, 1971.

On a separate but related point, I also would grant the relief now requested by International Paper and Mississippi Power and Light, asking moderation of the declaration that the Commission's order "would be an absolute defense for United against all claims for specific performance, damages, or other requests for relief." This is a self-serving dictum not binding on anyone, least of all the courts who must ultimately rule upon the effect of our orders. I very much doubt that the judicial branch can be foreclosed from awarding damages for breach of a substitute fuel clause in a contract which neither required nor received the approval of this Commission, to take the one example cited by International Paper. A proper sense of comity in judicial-administrative relations calls for an abandonment of this fruitless attempt to delimit judicial remedy.

/s/ JOHN A. CARVER, JR.
John A. Carver, Jr.,
Commissioner

APPENDIX F

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

CERTIFICATES — COST OF SERVICE — DELIVERABILITY — END USE — FINANCIAL AND ECONOMIC FEASIBILITY — GAS SUPPLY — INTERCONNECTION — JURISDICTION — MARKETS — SALES FOR RESALE — TRANSMISSION FACILITIES — VOLUMETRIC LIMITATIONS

Before Commissioners: JOHN N. NASSIKAS, *Chairman;* JOHN A. CARVER, JR., ALBERT B. BROOKE, JR., PINKNEY WALKER, and RUSH MOODY, JR.

UNITED GAS PIPE LINE COMPANY) DOCKET NO. CP71-89

OPINION NO. 610

OPINION AND ORDER FINDING JURISDICTION AND REMANDING PROCEEDING FOR RECEIPT OF ADDITIONAL EVIDENCE

(Issued February 9, 1972)

NASSIKAS, Chairman:

1. United Gas Pipe Line Company (United) filed on October 1, 1970, an application pursuant to Section 7(c) of the Natural Gas Act for a certificate of public convenience and necessity authorizing certain operations, sales and services. Specifically, United seeks to have added to its existing certificated system two large service areas in Louisiana and a few sales for resale and services in Texas. United avers that it now seeks to obtain a certificate authorizing the aforementioned operations, sales, and services because of the Commission's holding in the *Florida Parishes* case[1] to the effect that the commingling in trans-

[1] *United Gas Pipe Line Co.*, 30 FPC 560 (1963), *aff'd sub nom. Louisiana Public Service Commission* v. *F. P. C.*, 359 F.2d 525 (5th Cir. 1966), *cert. denied*, 385 U.S. 833 (1966).

mission facilities of gas moving in interstate commerce with local or intrastate gas makes the operation of the facilities, as well as the sales and services rendered by means of such facilities, subject to the Commission's jurisdiction.

2. A hearing was held in this proceeding from June 7, 1971, through June 18, 1971.[2] At the conclusion of the hearing United moved for omission of the intermediate decision procedure and that motion was granted by the Commission's order issued July 2, 1971. Thereafter, 17 parties filed initial briefs and 16 submitted reply briefs.[3] Since this order is in the nature of an interim decision pending the receipt of additional evidence upon remand, which we order herein, the arguments of the parties will not be referred to herein except in a few minor respects. The oral arguments requested by some parties are denied be-

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[2] The following parties have intervened in the proceeding: Algonquin Gas Transmission Company; Boise Southern Company; The Parish of Cameron, Louisiana; Town of Carencro, Louisiana; Cities Service Oil Company; Consolidated Gas Supply Corporation; Gulf States Utilities Company; Humble Oil & Refining Company; Laclede Gas Company; State of Louisiana; Louisiana Gas Service Company; The Louisiana Municipal Association; Louisiana Power & Light Company; The Louisiana Public Service Commission; Mid Louisiana Gas Company; The Public Service Commission of the State of Missouri; Mobile Gas Service Corporation, Mississippi Valley Gas Company and Clarke-Mobile Counties Gas District; Monsanto Company; National Gypsum Company, Scott Paper Company and Stauffer Chemical Company; The City of New Orleans, Louisiana; New Orleans Public Service Inc.; The Public Service Commission of the State of New York; The Ohio Fuel Gas Company and The Manufacturers Light and Heat Company; Shell Oil Company; Southern Natural Gas Company; Texaco Inc.; Texas Eastern Transmission Corporation; Texas Gas Transmission Corporation; Towns of Walker and Livingston, Louisiana; and United Gas, Inc.

[3] On November 2, 1971, the State of Louisiana, Louisiana Municipal Association and Parish of Cameron, Louisiana, filed a motion for permission to file a late reply brief submitted therewith. We have accepted the brief for filing and have considered the arguments made therein.

cause the deficient record would make the holding of oral argument nonproductive at this stage of the proceeding.

JURISDICTIONAL ISSUE

3. The first issue to be resolved is whether the Commission has jurisdiction over the operation of the facilities involved and over the sales and other services being rendered by means of such facilities. That question must be determined on the basis of the gas flow in the areas concerned as shown by the evidence.

(1) Description of Texas Facilities, Sales, and Services

4. United's evidence shows that it has already received a certificate from the Commission authorizing the construction and operation of all the transmission facilities which it owns and operates in its Victoria Division of Texas. The Victoria Division extends along the Texas Gulf Coast from a point near Agua Dulce to a point northwest of Houston. United's testimony shows that it has never obtained a certificate authorizing the sale of gas from the Victoria Division to distributors which resell the gas in 14 communities, nor has United ever obtained a certificate authorizing it to deliver gas to the 7 direct industrial customers which it serves from its facilities in the Victoria Division.

5. United's flow diagrams show that United has a single integrated pipeline system in the Victoria Division. Gas is delivered into the system from numerous gas fields and travels out of the State of Texas in interstate commerce except for deliveries made from the interstate facilities to the 14 communities and 7 direct-sale customers which United seeks authorization to serve.

(2) **Determination of Jurisdiction Regarding Victoria Division**

6. There appears to be no doubt but that the Commission has jurisdiction over the 14 sales for resale and the transportation and delivery of gas to the seven direct-sale customers of the Victoria Division. In *F. P. C.* v. *Amerada Petroleum Corp.*, 379 U.S. 687 (1965), the Supreme Court affirmed the Commission's assertion of jurisdiction over the sale and transportation of gas in *Montana-Dakota Utilities Co.*, 30 FPC 200 (1963). In the *Amerada* case the interstate pipeline company purchased gas at the tailgates of three gasoline plants within the State of North Dakota and commingled in the same pipeline gas which was contractually destined for use only within the State with gas purchased from the three plants for use outside of the State. The Commission held that the commingling of the so-called intrastate gas with the gas moving out of the State converted all the sales from the gasoline plants into sales for resale in interstate commerce subject to the jurisdiction of the Commission. In the *Florida Parishes* case *supra* the Commission stated that "* * * The removal of a portion of the gas thus flowing in interstate commerce does not change the gas removed from the stream into intrastate gas" (30 FPC at 563).

7. Since the evidence in this proceeding shows that United purchases gas from many sources for transportation and resale in interstate commerce and commingles the gas traveling to markets outside the State with gas delivered to customers within the State, all sales for resale and deliveries to direct-sale customers within the State are subject to the Commission's jurisdiction under the rationale expressed by the Commission in the *Florida Parishes* and *Amerada* cases.

8. However, the Commission at this time does not believe it would be in the public interest to grant a certificate with respect to the Victoria Division because United's evidence is unclear in some respects. Specifically, United did not make it clear in its exhibits whether it is now rendering some service pursuant to Commission authorization and wishes to have additional sales for resale and services certificated, or whether it is now rendering no service in the Victoria Division pursuant to Commission orders and now wishes to obtain a certificate covering all sales for resale and services being performed in the Victoria Division. United's evidence should also clarify whether sales to pipeline companies shown on the flow diagrams have been certificated, whether any of the other deliveries shown on the flow diagrams have heretofore been certificated, and whether the flow diagrams reflect all services and sales being rendered, or only those for which a certificate is requested. United's evidence in the remanded proceeding should show whether the Victoria sales and services have heretofore been included as requirements to be met when presenting gas reserve and deliverability data to the Commission in certificate cases or in the preparation of its Form 15. Additionally, United should present evidence with respect to alternate sources of gas supply for the Victoria customers.

(3) **Description of Louisiana Facilities, Sales, and Services**

9. The certificate which United seeks for Louisiana facilities, sales, and services would not only cover authorization to make sales for resale and deliveries of gas to direct-sale customers, but would also grant authority to operate the facilities by means of which such sales and services are rendered.

10. The facilities involved are situated in that portion of United's service area known as the New Orleans Division which is located entirely in Southern Louisiana south of Marksville, Louisiana. The New Orleans Division is further subdivided into two districts called the Lafayette District and the New Orleans District. The Lafayette District lies in the western part of Southern Louisiana west of Baton Rouge and Napoleonville, while the New Orleans District is situated in the eastern part of Southern Louisiana and includes Baton Rouge and Napoleonville.

11. Since United operates an existing interstate pipeline system in Southern Louisiana under certificates issued by the Commission as well as the facilities comprising the Lafayette and New Orleans Districts, United's evidence includes maps which use three colors to differentiate the various facilities and service areas. The certificated transmission lines are shown in black, the Lafayette District facilities are depicted in purple, and the New Orleans facilities are outlined in green. Throughout this opinion the purple facilities will be referred to as the Lafayette facilities and the green facilities will be referred to as the New Orleans facilities. United's application requests that the Commission certificate the Lafayette and New Orleans facilities and all sales and services rendered by means of such facilities.

12. Although United's Exhibit 1 shows letter designations from "A" through "W" to indicate that there are 24 points where interstate gas enters the Lafayette and New Orleans facilities, none of those interconnections has ever been certificated by the Commission. Thus, the facts which must be used for determining jurisdiction are based on unauthorized flows of interstate gas into and out of the Lafayette and New Orleans facilities. Diagrams showing the flow of gas on an annual basis (for the 12 months ending December 31, 1969) were presented by United in support of

its belief that the Lafayette and New Orleans facilities are now integrated with its interstate system. The Commission has examined both the annual flow diagrams and the flow diagrams for the peak day of January 6, 1970, which were received in evidence as Item E (Tr. 558). In addition, the Commission has taken official notice of United's flow diagrams for the peak day of March 3, 1971, which were filed July 7, 1971, pursuant to Section 260.8 of the Commission's Regulations under the Natural Gas Act.

13. While United's Exhibit 1 shows 24 points indicating where interstate and uncertificated gas supplies may be commingled, scrutiny of the 12 points which were discussed in the cross-examination of United's witnesses is sufficient to establish that the operation of United's Lafayette and New Orleans facilities are presently subject to the Commission's jurisdiction.

(a) **Flow of Interstate Gas in Lafayette Facilities**

14. At point "A" on Exhibit 1 there is an interconnection between an interstate transmission line of Texas Eastern Transmission Corporation and a Lafayette pipeline lying north of the City of DeQuincy. Since this interconnection is a point at which United exchanges gas with Texas Eastern, the flow diagram shows no annual volumes to be entering United's system; but on the peak day of March 3, 1971, Texas Eastern delivered 105,173 Mcf of which approximately half traveled southeasterly toward the Lake Charles area and the remaining volume was transported northwesterly into the Leesville area.

15. Point "B" on Exhibit 1 is located at an interconnection between Texas Gas Transmission Corporation's interstate line and a Lafayette pipeline near Iowa, Louisiana. On an annual basis Texas Gas delivered 1,371,681 Mcf to United at that point and on the peak day of March 3, 1971, United received 17,636 Mcf from Texas Gas at that point. The gas

was commingled with intrastate gas and sold to customers in the Lake Charles area.

16. Point "C" is located on the western boundary of the State of Louisiana southeast of Beaumont, Texas. At that place a Lafayette pipeline interconnects with Pennzoil Pipeline Company's facilities which transport gas into Texas. On an annual basis 24,254,556 Mcf are delivered to Pennzoil and on the peak days of March 3, 1971, and January 6, 1970, volumes of 1,075 Mcf and 58,399 Mcf, respectively, were delivered to Pennzoil for transportation out of the State of Louisiana.

17. At point "D" United receives gas in the East Cameron Area from Tennessee Gas Pipeline Company's interstate pipeline and such gas is transported along with locally-produced gas to consumers in the Lake Charles area. On an annual basis Tennessee delivered 1,357,396 Mcf and on the peak days of March 3, 1971, and January 6, 1970, Tennessee delivered 24,079 Mcf and 41,323 Mcf, respectively.

18. At point "H" gas produced in the Lawson field area is delivered into a pipeline extending from Lafayette to Bancroft. Although all of the gas received at this point is produced in Louisiana, the gas is split at the point of delivery so that out of 16,594,766 Mcf received on an annual basis, 9,717,494 Mcf are transported easterly for delivery into one of United's interstate pipelines transporting gas out of the State, while the remainder is transmitted to a market in the Leesville area. On the peak day of March 3, 1971, 38,138 Mcf entered the line and all of it was transported out of the State. Of the 38,429 Mcf delivered from the Lawson field on the peak day of January 6, 1970, 21,395 Mcf were transported out of the State while the remainder was consumed in local markets.

19. At point "Q" Tennessee delivers gas to United from its interstate line near Iowa, Louisiana. On an annual basis Tennessee delivered 22,138,127 Mcf and on the peak days of March 3, 1971 and January 6, 1970, Tennessee delivered 47,919 Mcf and 117,173 Mcf, respectively. The gas is transported by United with locally-produced gas and consumed by customers in the Lake Charles area.

(b) **Flow of Interstate Gas in New Orleans Facilities**

20. At point "I" United receives gas from producers in the Bastian Bay area whose sales have been certificated for interstate commerce. The gas enters one of United's major certificated interstate gas pipelines extending toward Lirette, Louisiana, and also enters one of United's 20-inch supply lines which transports gas to New Orleans. On an annual basis the 20-inch line received 3,286,407 Mcf from the Bastian Bay area and on the peak days of March 3, 1971, and January 6, 1970, received 72,990 Mcf and 56,182 Mcf, respectively.

21. At point "J" United receives gas from producers in the Bay Marchand, Calliou Island, and Bayou Jean la Croix fields. On an annual basis United received 20,414,367 Mcf from those fields of which 2,119,631 Mcf were transported in United's pipeline extending to the New Orleans area while the remainder of the gas was transported to market in United's certificated Lirette-Mobile interstate pipeline. On the peak day of January 6, 1970, 66,432 Mcf were received of which 16,437 Mcf entered the New Orleans pipeline and the remainder flowed into the Lirette-Mobile line. On the peak day of March 3, 1971, 47,116 Mcf were received and all of the gas on that day entered the Lirette-Mobile pipeline.

22. At point "K" United receives gas from producers in the Houma and other fields. The stream is split with

some gas entering a 12-inch line extending toward New Orleans while the bulk of the gas travels in United's certificated Lirette-Mobile interstate pipeline. On an annual basis 13,481 Mcf entered the New Orleans pipeline and on the peak days of March 3, 1971, and January 6, 1970, no gas entered the New Orleans facilities.

23. At point "L" United's certificated Kosciusko interstate pipeline delivers large volumes of gas into local facilities for transportation to Gulf States Utilities Company's Willow Glen electric generating station which is located south of Baton Rouge. On an annual basis 38,177,591 Mcf were delivered at that point and on the peak days of March 3, 1971, and January 6, 1970, United delivered 64,017 Mcf and 15,744 Mcf, respectively, for consumption in the power plant.

24. Point "M" is located very close to point "L", but the gas flows from the certificated interstate line into an uncertificated pipeline extending toward the Baton Rouge area. On an annual basis 2,055,759 Mcf were delivered and on the peak days of March 3, 1971, and January 6, 1970, 52,762 Mcf and 64,868 Mcf, respectively, were delivered.

25. At point "X" United receives gas produced in the De Large field area. After receipt, the gas stream is split with gas entering both the interstate and local markets. On an annual basis 2,773,124 Mcf were received of which 157,426 Mcf were consumed in the Dulac area. On the peak days of March 3, 1971, and January 6, 1970, 5,490 Mcf and 9,061 Mcf were received with 77 Mcf and 145 Mcf, respectively, being consumed in local markets while the remainder entered interstate pipelines.

(c) **The Unauthorized Gas Flows Establish Jurisdiction**

26. The foregoing description of the flow of interstate gas in United's Lafayette and New Orleans facilities shows beyond any doubt that United's introduction of substantial quantities of gas into those uncertificated facilities from its interstate gas sources is a sufficient commingling of interstate and uncertificated gas supplies to bring the operation of the Lafayette and New Orleans facilities, together with the sales and services made from those facilities, within the Commission's jurisdiction under the Natural Gas Act.

27. As indicated in the foregoing discussion of delivery points, on the peak days of 1971 and 1970, interstate volumes of 189,846 Mcf and 153,376 Mcf, respectively, flowed into the New Orleans District facilities. Those volumes would be adequate to heat well over 100,000 single-family residences on a cold day.

28. A *de minimis* argument is advanced by certain parties with respect to commingled gas in that portion of the New Orleans District, referred to as the Green System-East, located east of the Napoleonville-Kosciusko line. New Orleans Public Service Inc. (NOPSI) offered Exhibit 22 showing that deliveries of interstate gas by United into the Green System-East represented 7.79 percent of peak day requirements and 2.39 percent of annual requirements for the 12 months ended July 31, 1970.

29. A comparison of the adjusted flow diagrams upon which Exhibit 22 is based[4] with United's actual flow data on file with the Commission, referred to previously, shows

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[4] Exhibit 22 indicates that the source for the data shown therein was United's response to FPC Staff Request No. 38 in Docket No. RP71-41, prepared for United's rate proceeding in that docket, which consisted of flow diagrams captioned "adjusted".

that the actual peak-day deliveries from gas supply sources differ from the adjusted flows in almost every instance.

30. At Bastian Bay (point "I") where interstate gas entered the Green System-East the actual volumes shown for the peak day, January 6, 1970, exceeded the adjusted flow by 19,489 Mcf. This increases the percentage of peak-day injections of interstate gas into the Green System-East from 7.79 percent to 10.7 percent. A review of the same data with respect to the annual volumes of interstate gas flowing into the Green System-East indicates that the 2.39 percent should be increased to about 3.4 percent. We find that these quantities are not *de minimis*.

31. Furthermore, United projects the peak-day demand in the New Orleans-Baton Rouge area to be at a level of 1,002,000 Mcf during the 1971-72 winter period with a projected intrastate supply of only 413,000 Mcf (Tr. 91-92). Accordingly, United shows that there is a peak-day deficiency in gas supply of 598,000 Mcf which it contends must be supplied by interstate sources. On the basis of this evidence, there would be a substantial gas supply deficiency in the City of New Orleans area, within the Green System-East, of approximately 448,000 Mcf per day during the 1971-72 winter heating season which would be met with volumes from interstate sources transported through certificated interstate facilities. Moreover, United contends that this deficiency[5] will increase for the peak day of the 1972-73

[5] A question has been raised as to whether a producer affiliate of United has gas available, which can be delivered into either interstate or uncertificated facilities, in sufficient quantities to meet the New Orleans District's deficiencies and thereby obviate the need for United to obtain gas from its interstate sources. Even assuming that the Commission sanctions such an arrangement, we find no evidence to support that proposition; to the contrary, the evidence in the record indicates that on peak days gas from interstate sources in volumes of about 600,000

winter heating season and that it will be necessary for United to increase its deliveries into the Green System-East if that system is to remain on a parity with all other systems.[6]

32. Mr. Echterhoff testified at Tr. 91-92 that the peak-day deficiency of intrastate reserves for meeting the needs of the New Orleans District would be 684,000 Mcf in 1972-73, *i.e.*, the requirements were 1,018,000 Mcf and the "intrastate" reserves were 334,000 Mcf. Thus, 67.2 percent of the peak-day requirements would have to come from *interstate* sources.

33. If the Green System East (or New Orleans area by itself) is isolated from the Willow Glen-Baton Rouge area, the needs for the New Orleans area by itself amount to 542,000 Mcf. The deficiency would be made up by obtaining interstate gas from the Bastian Bay-Lirette-Mobile system.

34. Testimony in the record of the case reveals that the peak-day deficiency on the Green System would result in approximately 70 percent curtailment of the Green System, including the New Orleans distributor — the company upon which human needs customers depend. To test this testimony, we have taken notice of the filings required by our regulations.

35. The peak-day flow diagrams filed by United pursuant to Section 260.8 of the Commission's Regulations as well as the flow diagrams in the record of this case reveal the flow of interstate gas into United's uncertificated facilities. We

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Mcf will have to be introduced into the New Orleans District. To test the possibility of obtaining gas in those quantities from Lirette sources, we have examined both the Form 15 and System Flow Diagram reports filed pursuant to our regulations. The data from those sources show that the peak-day flows from Lirette to *any* destination would fall short of meeting the requirements by several hundred thousand Mcf.

[6] See also Exhibits 3 and 34.

examined the peak-day flow diagrams for several reasons. First, it is important in this proceding to understand the impact on United's existing interstate customers resulting from deliveries of gas to the New Orleans and Lafayette Districts on peak days because those volumes are illustrative of the extent of curtailments to United's existing customers which will be necessary in order for the uncertificated markets to be served on cold days. Second, Section 157.14(a)(8) requres the submission of peak-day flow diagrams as a part of all certificate applications in order to show the applicant's ability to serve its proposed customers on the day of maximum demand. Third, the Commission normally examines peak-day flows in determining jurisdiction. See, *e.g., Florida Parishes, supra,* 30 FPC at 564, and *Amerada, supra,* 30 FPC at 203. Fourth, some of the parties had relied on Exhibit 22 showing peak-day flows based on flow diagrams which were introduced in United's rate proceeding in Docket No. RP71-41, and it was appropriate that the Commission examine peak-day flow diagrams which reveal actual flows of gas on the peak day rather than the adjusted flows which were utilized in the flow diagrams submitted in the rate proceeding.

36. We have examined all available data in finding that the uncertificated facilities, as well as the sales for resale and transportation services rendered thereby, are subject to the Commission's jurisdiction. In addition, the annual flow diagrams which were a part of the record reveal that gas flows out of the Green System-East.

37. The estimony (Tr. 326) indicates that point "M" is at the extreme west end of the Green System-East. At that point 8,256,920 Mcf left the Green System-East and entered the Green-System West and of that volume 6,879,259 Mcf were transported toward Willow Glen while the remaining 1,377,661 Mcf were transported toward Baton Rouge and

commingled with 2,055,759 Mcf of interstate gas delivered into the Green System-West from the Napoleonville-Kosciusko interstate pipeline. The commingled stream of Green System-East and interstate gas thereafter was used to serve markets in Louisiana and ultimately provided 2,054,190 Mcf at point "U" for delivery to Mid Louisiana Gas Company's interstate pipeline which extends out of the State of Louisiana.

38. The importance of examining both annual and peak-day flow diagrams becomes obvious from the foregoing illustration because the peak-day flow diagram for March 3, 1971, shows that 22,811 Mcf were transported out of the Green System-East into the Green System-West but were thereafter commingled with interstate gas and wholly used in the Willow Glen area. Although 38,557 Mcf were delivered to Mid Louisiana on that day at point "U", none of the Green System-East gas is shown to be flowing beyond the Willow Glen pipeline. Of course, gas does flow out of the Green System-East on both a peak-day and an annual basis, but the Green System-East gas does not appear to flow out of the State of Louisiana except on an annual basis.

39. We have considered the volumes delivered at all points in our discussion with respect to the flow of gas in the Lafayette and New Orleans Districts. Our finding of jurisdiction was based on the flow of interstate gas in and out of the jurisdictional uncertificated facilities. It is unnecessary for us to separate interconnection points in the Green System-East from those related to the Green System-West because the New Orleans District is situated in the eastern part of Southern Louisiana and *includes* Baton Rouge and Napoleonville.

40. As previously stated, we have considered the actual peak-day volumes as set forth in United's flow diagrams filed pursuant to Section 260.8 of our Regulations and the

adjusted volumes which were shown on the flow diagrams presented in United's rate case in Docket No. RP71-41 that were used by the witness sponsoring Exhibit No. 22 from which the 2.39 percent commingling figure is obtained.

41. In addition to the adjusted volumes used in United's rate proceeding in Docket No. RP71-41, it should be noted that if we had referred to the flow diagrams submitted by United in its most recent rate proceeding in Docket No. RP72-75, we would have been provided with data showing that much larger volumes of gas are to be transported on both a peak-day and annual basis into the Green System-East. To be specific, instead of a zero volume entering the Green System-East at point "J" on the peak day of March 3, 1971, the adjusted figure would be 86,766 Mcf, and instead of 72,990 Mcf entering the Green System-East at point "I" on the peak day of March 3, 1971, the adjusted figure would be 108,371 Mcf. Similarly, instead of an annual volume of 2,119,631 Mcf entering the Green System-East at point "J", the adjusted figure would be 1,371,196 Mcf, and instead of an annual volume of 3,286,407 Mcf entering the Green System-East at point "I", the adjusted figure would be 11,024,446 Mcf. Since the adjusted figures used in Docket No. RP72-75 are attempting to estimate volumes for the 1971-72 heating season, they indicate that the Green System-East is expected by United to become increasingly reliant upon deliveries from United's interstate facilities in order to meet the uncertificated market's gas requirements.

42. In determining the jurisdictional issue, however, we do not believe that the relative level of the volumes involved are controlling. Section 1(b) of the Act does not delimit the amount of gas to be transported or sold in interstate commerce necessary for the exercise of Commission jurisdiction.

43. The case of *Connecticut Light & Power Co.* v. *F. P. C.*, 324 U.S. 515, 535-36 (1945), arising under the Federal Power Act, is instructive in this regard. There the Supreme Court, addressing itself to a *de minimis* argument, stated:

> Another contention made by the Company may be shortly disposed of. It is contended that the volume of energy passing over certain of these facilities is insignificant in proportion to the total. Only about one-fifth of one per cent of all the energy received and generated by the Company throughout the State of Connecticut was transmitted out of the state * * * Congress appears to have left to the Commission's sound administrative discretion to determine whether or not to assert its authority in such situations. Congress annually receives a report of the Commission's work and appropriates the funds for its continuance. If it thinks the Commission is over-extending its attention to trivial situations it has ready means of control in its hands. The wisdom of its work is not our concern, but only its legal justification. We do not find that Congress has conditioned the jurisdiction of the Commission upon any particular volume or proportion of interstate energy involved, and we do not think it would be appropriate to supply such a jurisdictional limitation by construction.

44. Our decision herein is in accord with *Federal Power Commission* v. *Florida Power & Light Co.* (U.S. Supreme Court No. 70-38, decided January 12, 1972, ... U.S. ....., 40 LW 4141) wherein the Supreme Court held that an electric utility was subject to the jurisdiction of this Commission because energy transmitted by it was commingled with energy transmitted by a jurisdictional company. There the issue was whether any energy was transmitted in interstate commerce *at all*. As the Court stated the test is not how much, but whether; "* * * no matter how small the quantity, FPC jurisdiction will attach because it is settled that

Congress has not 'conditioned the jurisdiction of the commission upon any particular volume or proportion of interstate energy involved and we do not . . . supply such a jurisdictional limitation by construction'" (Slip Op., p. 9, n. 10). The dissent noted that the commingling is minuscule and incidental.

45. The Louisiana Public Service Commission and several other parties contend that the Green System-East should be exempted from Commission jurisdiction under Section 1(c) of the Act.[7] The argument is made that to the extent some volumes of interstate gas have been delivered into the Green System-East such gas has been received, transported, and consumed wholly within the State of Louisiana, and that since the rates, services and facilities of the Green System-East are regulated by the Louisiana Public Service Commission, the requirements for exemption under Section 1(c) have been met. United maintains that Section 1(c) is inapplicable since the Louisiana Public

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[7] Section 1(c) of the Act reads as follows:

(c) The provisions of this Act shall not apply to any person engaged in or legally authorized to engage in the transportation in interstate commerce or the sale in interstate commerce for resale, of natural gas received by such person from another person within or at the boundary of a State if all the natural gas so received is ultimately consumed within such State, or to any facilities used by such person for such transportation or sale, provided that the rates and service of such person and facilities be subject to regulation by a State commission. The matters exempted from the provisions of this Act by this subsection are hereby declared to be matters primarily of local concern and subject to regulation by the several States. A certification from such State commission to the Federal Power Commission that such State commission has regulatory jurisdiction over rates and services of such person and facilities and is exercising such jurisdiction shall constitute conclusive evidence of such regulatory power or jurisdiction. [68 Stat. 36 (1954); 15 U.S.C. § 717(c)]

Service Commission may not regulate direct sales,[8] and that granting an exemption under Section 1(c) would leave a regulatory gap.

46. Staff opposes an exemption on additional grounds. It dismisses initially the assertion that Section 1(c) is self-executing and that no application therefor nor showing in support thereof need be made, citing the provision in the Section requiring an evidentiary showing with respect to State commission jurisdiction. Section 1(c) is applicable, argues Staff, only "* * * if all the natural gas so received is ultimately consumed within such State," and that is not the case with all the gas received by United from other persons in Louisiana, *e.g.*, deliveries from the Getty plant at Bastian Bay. It also contends that the "from another person" requirement of the Section is overlooked by those seeking an exemption.

47. The proponents of the Section 1(c) exemption agree that United's Green System East receives gas from United's system, but seek succor by citing the case of *Mountain Gas Company,* Docket No. CP68-303, and *Cabot Corporation,* Docket No. CP68-176, 42 FPC 305, *aff'd sub nom. Public Service Commission of West Virginia* v. *F.P.C.,* 437 F.2d 1234 (4th Cir. 1971), for the proposition that the gas need not be received "from another person" as plainly set out in

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[8] Art. 6, Sec. 4 of the Louisiana Constitution, as amended in 1964, provides in pertinent part that: "* * * the [Public Service] Commission shall have no power or authority to supervise, govern, regulate, and control any aspect of sales of natural gas direct to industrial users for fuel or for utilization in any manufacturing process, whether such direct sales are made by natural gas producers, natural gas pipeline companies, natural gas distribution companies, or any other person engaging in such sale of natural gas."

[9] In that case part of the gas was received by Cabot from its own wells at some of the facilities proposed to be exempted. The bulk of the gas, however, was purchased from Tennessee Gas Pipeline Company.

Section 1(c). In our view *Mountain Gas* is inapposite since most of the gas there in question was purchased from another person.[9] Noting that Section 1(c) is applicable solely "to any person engaged in or legally authorized to engage in the transportation of gas in interstate commerce," Staff additionally asserts that the arguments of the parties favoring exemption are inconsistent with their contention that the Green System is an entirely separate intrastate entity. This apparent inconsistency has no bearing on our determination of this question, as we reject the tortured reasoning which would artificially maintain a division of the integrated facilities of United's system. We find that a Section 1(c) exemption does not obtain in the circumstances presented.

48. The Louisiana Commission does not regulate any aspect of direct sales and thus, in any event, an exemption would not be available, even to a separate pipeline company.[10] This Commission, on the other hand, has substantial regulatory authority over the service of gas to direct customers. Deliveries to direct customers cannot be made without a certificate from this Commission and the Commission must determine whether the public convenience and necessity is met in light of the proposed terms of those transactions.[11] In addition, the Commission, pursuant to Section 7(b), must determine whether service to a direct customer or any other customer should be abandoned be-

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[10] We take official notice of a letter to this Commission, dated June 16, 1971, in which the Chairman of the Louisiana Public Service Commission indicates that the Louisiana Commission does not exercise jurisdiction over direct sales to industrial customers. We note that 1(c) exemptions have been previously granted within Louisiana. See *Central Louisiana Electric Co., Inc.*, Docket No. CP62-129, 27 FPC 374 (1962); *United Gas Pipe Line Co.*, Docket No. CP68-203, and *Sugar Bowl Gas Corp.*, Docket No. CP68-204, 39 FPC 619 (1968). However, we note that in each case that there was no disclaimer of jurisdiction by the Louisiana Public Service Commission, as in this case.

[11] *Panhandle Eastern Pipe Line Co.* v. *F. P. C.*, 232 F.2d 467, 471 (5th Cir. 1956).

cause of depleted gas supply or because it no longer meets the public convenience or necessity. The price at which the direct industrial sale is made is thus material in both certificate and abandonment proceedings. While the absence of State regulation is not material to a determination of our own jurisdiction, it nevertheless follows that the exercise of jurisdiction by this Commission over the Green System-East would provide regulation related to certain direct service where none is presently undertaken by the State and therefore contribute measurably to the regulatory process.

49. We recognize, however, that the State purports to regulate sales for resale in the New Orleans and Lafayette Districts. While our assertion of jurisdiction herein would substitute Federal regulation for State regulation over such sales, the substitution of Federal regulation occurs simply as a consequence of our determination that these sales are in interstate commerce and the fact that State regulation will be affected has no bearing on our determination. Moreover, the exercise of our jurisdiction over sales and services in interstate commerce does not impinge upon State regulation of sales and services by the distributors receiving gas from United.

50. In declining to grant United an exemption under Section 1(c) of the Act, we are aware that such an exemption was granted in *United Gas Pipe Line Co.*, Docket No. CP66-137, 35 FPC 172. However, that case involved a sale for resale over which the Louisiana Public Service Commission asserted jurisdiction; moreover, the gas was purchased from Transcontinental Gas Pipe Line Corporation, "another person" within the meaning of Section 1(c), and the facilities involved were not connected with United's interstate system. The present case is clearly distinguishable inasmuch as it involves direct sales, over which the Louisiana Public Service Commission has disclaimed jurisdiction, the gas is not purchased from "another person", and the

facilities involved are directly connected to United's interstate system.

51. It is argued that United deliberately introduced interstate gas into the New Orleans District to bring about the situation that exists in order to serve its own interests with respect to its direct-sale contracts and curtailment plans. The alternative that this argument suggests is that the Commission should order United to desist from making any further deliveries into the New Orleans District. With the exception of two producers, no party to this proceeding suggests this course of action. It appears from the record that were it not for deliveries of interstate gas in the past years, the system would have been unable to meet its peak-day requirements.[12] Moreover, as we have noted herein, the Green System-East will have a considerable deficiency in its peak-day gas requirements for the current winter heating season as well as for the next heating season. Thus, the jurisdictional facts of interstate transportation and sale of gas exist; the motives that brought them about are not material to our determination.[13]

52. We believe that no extended discussion of the applicable law is required in support of our jurisdiction under the circumstances presented. The Commission's opinion in *Lo-Vaca Gathering Co.*, 26 FPC 606 (1961), *aff'd sub nom. California* v. *Lo-Vaca Gathering Co.*, 379 U.S. 366 (1965), followed by the Supreme Court's *Amerada* and the Fifth Circuit's *Florida Parishes* opinions *supra*, leaves no room for argument that the commingling of interstate gas with intrastate gas and the delivering of gas to intrastate markets from interstate pipelines are sufficient integration of interstate and intrastate operations to bring the uncertificated sales and facilities within the Commission's jurisdic-

[12] See Exhibit 22.

[13] See *Western Union Telegraph Co.* v. *Speight*, 254 U.S. 17 (1920); *Price* v. *Western Union Telegraph Co.*, 156 Fla. 406, 23 So.2d 491 (1945).

tion. As the court pointed out in the *Florida Parishes* case (359 F.2d 525 at 528):

> * * * The facts in each of those cases [*La-Vaca* and *Amerada*] more strongly supported the argument for state jurisdiction over the gas produced, gathered, transported and sold in the same state than do the facts of this proceeding. In each instance, however, the Supreme Court held that the mixing of intrastate gas with a substantial portion of interstate gas for pipeline transportation in one commingled stream gave the Commission jurisdiction "at the outset over the entire transaction."

53. We wish to make clear that the facilities, sales, and services in question became subject to our jurisdiction at such time as the commingling of interstate and intrastate gas took place. The Commission's jurisdiction under the Natural Gas Act does not depend upon whether a natural-gas company fulfills its obligation thereunder to obtain a certificate of public convenience and necessity. *J.-M. Huber Corp.* v. *Federal Power Commission*, 236 F.2d 550 (3rd Cir. 1956), *cert. denied*, 352 U.S. 971 (1956). *International Paper Co.* v. *Federal Power Commission*, 438 F.2d 1349 (2nd Cir. 1971), *cert. denied*, —— U.S. —— (Sup. Ct. No. 70-216, October 12, 1971).

54. Although there is sufficient evidence in the record to find jurisdiction, we believe that certain aspects of United's operation of its facilities in the area in question require amplification. In the remanded proceeding United should present an Exhibit K setting forth the lengths and diameters of pipelines and other facilities in the Lafayette and New Orleans Districts for which it seeks certification. The original cost of all facilities should be shown together with accrued depreciation thereon.

55. During the cross-examination it appeared that United has previously obtained certificates to make sales from

some of the uncertificated facilities. For example, although United seeks to have its Weeks Island pipeline certificated in this proceeding, the Commission issued on June 26, 1968, an order in *United Gas Pipe Line Co.*, 39 FPC 1029, certificating a sale to Humble Oil & Refining Company from that pipeline. Moreover, despite the fact that the order specifically restricts deliveries of gas to Humble to a maximum of 3,500 Mcf per day, Exhibit 17 indicates that United has delivered up to 7,010 Mcf per day to Humble at that point. Likewise, the Commission has apparently certificated some facilities near the lateral line serving Baton Rouge, but United's witness was not clear as to what those facilities were or whether they are still used for the purpose for which they were originally certificated.

56. United should also include in Exhibit K a separate breakdown of the facilities comprising the 24 interconnections at which interstate gas may be injected into the Lafayette and New Orleans facilities. Inasmuch as United claims that increasing quantities of interstate gas will be needed to supply the Southern Louisiana market, it should explain where the increased quantities of interstate gas will be obtained and which of the 24 interconnections will be used for that purpose.

CERTIFICATION ISSUES

(1) Introduction

57. As set forth in its opinion in *Kansas Pipe Line & Gas Co.*, 2 FPC 29 (1939), the Commission has considered five primary factors in determining whether a certificate of public convenience and necessity should be issued. Those five factors are whether a market for the gas has been shown, whether there is a gas supply available to serve the proposed markets for a time sufficiently long to justify the construction of the facilities, whether the facilities proposed

to be constructed are adequate from an engineering point of view, whether the proposed sales will return sufficient revenues to enable the applicant to recover the cost of service involved in rendering the proposed sales and services, and whether the applicant will be able to obtain the financing necessary to construct the proposed facilities. United's application in this proceeding is unusual in that the facilities for which it seeks a certificate have already been constructed, the markets have already been attached, the gas is already flowing, the facilities have already been financed, and proposed rate increases covering the sales involved are presently pending before the Commission.

58. Although the Lafayette and New Orleans District contain existing pipeline systems now in operation, those systems were constructed many years ago and have been operated as independent intrastate pipeline systems entirely separate from United's integrated interstate system over which the Commission exercises jurisdiction. Therefore, when United filed its application requesting that the Commission issue a certificate covering all the facilities, resales, and services being rendered in its Lafayette and New Orleans Districts, it was obligated to present evidence showing that the attachment of those facilities, resales, and services to the interstate pipeline system is required by the public convenience and necessity. While we recognize that with existing facilities certain conventional data may be omitted, we note certain deficiencies in the record as outlined below which should be the object of an additional evidentiary presentation.

(2) **Markets**

59. United's market evidence consisted of a tabulation of its resale and direct-sale customers showing the largest

[14] United is currently involved in a curtailment proceeding before the Commission in Docket Nos. RP71-29, *et al.*

volumes which they have taken on non-coincidental peak-days, but United failed to show what volumes it is obligated to deliver to its customers under the most recent service agreements and direct sale contracts. Since United is operating under the curtailment provisions of its tariff at the present time,[14] any certificate issued should contain volumetric limitations in accordance with the Commission's Statement of Policy in Order No. 431 issued April 15, 1971, in Docket No. R-418. Therefore, in the remanded proceeding United should present as part of its market evidence copies of the service agreements which it has most recently negotiated with its resale customers. If United's gas supply deficiency prevents it from proposing to deliver contractual volumes to its resale and direct-sale customers, it should make a separate tabulation of the actual volumes it expects to deliver in light of its current gas supply situation.

(3) **Gas Supply**

60. Since United is now curtailing deliveries to its customers, the Commission assumes that United has a deliverability of less than one year, but United did not present any evidence which would permit the Commission to evaluate the impact on the existing interstate customers that would result if the Commission were to certificate the service proposed to be continued in the Lafayette and New Orleans Districts. Therefore, United's gas supply evidence should show the volumes of gas which will be available to serve the existing interstate markets with and without the markets in the Lafayette and New Orleans Districts. Inasmuch as United claims that a much greater quantity of interstate gas will be needed to serve the Lafayette and New Orleans Districts within the next two or three years, its deliverability exhibit should project the impact on the existing interstate market if it were to be permitted to provide service from its interstate system to all of its customers in the Lafayette and New Orleans Districts.

61. United's shortage of gas raises the possibility that authorization of markets in the Lafayette and New Orleans Districts will result in the taking of disproportionate volumes of gas from existing industrial customers now being served with the gas supply previously committed to serving only interstate markets. Therefore, United's deliverability study should show to what extent the deficiencies in gas supply alleged for the Lafayette and New Orleans Districts are based upon the requirements of industrial customers as compared with the needs of residential and commercial customers.

62. A question in this proceeding is whether customers who were being served from what has previously been an entirely separate intrastate system with its own gas reserves should now be allowed to continue to purchase gas from a gas supply which presumably was not committed to serving an uncertificated system and its customers.

(4) **Engineering Feasibility**

63. United's evidence consisted of flow diagrams showing net movement of gas on only an annual basis. The Commission has compensated for United's failure to present peak-day flow diagrams by examining the diagrams for January 6, 1970, which were received in evidence as Item E and by taking official notice of the flow diagrams for the peak day of March 3, 1971. At the remanded hearing the peak-day flow diagrams for March 3, 1971, should also be received in evidence as an item by reference to the Commission's files.

64. The Commission normally evaluates engineering and economic feasibility on the basis of the third-year volumes of gas to be served in a proposed market. Since United has previously served the Lafayette and New Orleans Districts with gas from fields located fairly close to the markets, it is essential that United show how increasing quantities of

gas can be introduced into the Lafayette and New Orleans facilities so that the Commission will know whether additional facilities will have to be constructed to transport gas from interstate gas sources to markets in the Lafayette and New Orleans Districts.

(5) **Economic Feasibility**

65. To the extent that United addressed itself to the question of economic feasibility, it shows that the certificate should be denied because it claims that the direct-sale customers which are presently attached to the Lafayette and New Orleans facilities are noncompensatory since the rates in some of their contracts with United are so low that they do not cover United's average cost of purchased gas.

66. The Commission has for many years conditioned certificates to require pipeline companies and industrial customers to modify their contracts to remove "escape" clauses therefrom.[15] There have been instances where the Commission conditioned a certificate authorizing the expansion of a pipeline company's existing system upon the procure-

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[15] In Houston Texas Gas & Oil Corp., 16 FPC 118 (1956), *aff'd sub nom. Florida Economic Advisory Council* v. *F. P. C.*, 251 F.2d 643 (D.C. Cir. 1957), *cert. denied*, 356 U.S. 959 (1958), the Commission conditioned the certificate issued to require removal of clauses in contracts which would have permitted electric companies to pay transportation rates based on the competitive cost of oil. In *Northern Natural Gas Co.*, 22 FPC 164 (1959), *aff'd sub nom. Minneapolis Gas Co.* v. *F. P. C.*, 278 F.2d 870 (D.C. Cir. 1960), *cert. denied*, 364 U.S. 891 (1960), the Commission required a pipeline company to remove from its direct-sale contracts with electric companies clauses which would have permitted the electric companies to stop purchasing gas if the price of coal should become cheaper than the cost of gas.

[16] *Midwestern Gas Transmission Co.*, 22 FPC 775 (1959), *aff'd sub nom. Michigan Gas and Electric Co.* v. *F. P. C.*, 290 F.2d 374 (D.C. Cir. 1961), *cert denied*, 368 U.S. 897 (1961), *Northern Natural Gas Co.*, 30 FPC 859 (1963), and *Southern Natural Gas Co.*, 31 FPC 789 (1964).

ment of firm contracts with industrial customers to assure the economic feasibility of the proposed expansion.[16] In the remanded proceeding, if it is determined that the service United is rendering to industrial customers is non-compensatory, and if the certificate were otherwise required by the public convenience and necessity, the Commission could consider granting the certificate conditioned to assure that the allocable cost of service to the direct industrial customers is recovered.

67. Before the Commission can determine economic feasibility, however, United should present an economic feasibility study showing the cost of service allocable for the Lafayette and New Orleans Districts. Such a study should show the deficit, if any, which would result from serving both resale and direct-sale customers in the Lafayette and New Orleans Districts.

68. Gulf States Utilities Company presented Exhibit 24 which indicates that United's full cost of service in the entire New Orleans Division (which includes both the Lafayette and New Orleans Districts as well as United's *interstate* transmission lines) ranges from 3.4 to 4.5 cents per Mcf exclusive of the cost of purchased gas. However, Gulf States' exhibit needs to be refined so as to allocate only to the Lafayette and New Orleans Districts that portion of the cost of the interstate pipelines which should appropriately be assigned to those areas. Despite the unrefined nature of its evidence, Gulf States shows that the rate in its direct-sale contract with United fails to pay United's full cost of service associated with serving Gulf States' generating plants. The Commission must determine whether to certificate direct sales which do not pay their full share of the cost of service.

69. In presenting its economic feasibility evidence in the remanded proceeding, United may utilize the same rates

of return and depreciation which were employed in its last rate increase filings in Docket No. RP72-75. Use of such rates in a certificate case is illustrative of the highest costs the existing and proposed customers may have to pay and makes it possible to test the economic feasibility of proposed new service in light of rates being proposed for service to existing customers.

70. The foregoing discussion shows that the evidence in the record is insufficient to permit a determination of whether the certificate sought by United is required by the public convenience and necessity. We shall, therefore, remand the proceedings to the Presiding Examiner as hereinafter provided. Our determination that the Commission has jurisdiction over United's operations in the Victoria and New Orleans Divisions, however, requires that we address ourselves to the status of United's existing services in these Divisions pending the Commission's determination of the certificate issues.

71. In the absence of the issuance of a certificate at this time, we have two alternatives with regard to the existing service provided by United pending a Commission determination on remand: (1) the immediate termination by United of deliveries into the systems in question, or (2) the continuation of deliveries of interstate gas into these systems on an emergency basis pending final disposition of this matter.

72. Evidence of record shows that United's customers in this area have in the past received substantial quantities of interstate gas supplies during the 1970-71 heating season and, based on projections for the 1971-72 heating season and thereafter, will require more substantial quantities of interstate gas, approximately 67% of the peak-day requirements in the New Orleans District. Moreover, the record does not disclose the impact on United's customers in the

Victoria and New Orleans Divisions of an abrupt discontinuation of interstate deliveries into these systems.

73. In view of these facts, we believe that the public interest may best be served by continuation of United's service to prevent the undue hardship that might result from an immediate termination of interstate deliveries. We shall, therefore, authorize the continuation of such existing deliveries of interstate gas into the Victoria and New Orleans Divisions on an emergency basis, subject to the condition that these facilities be operated as part of United's integrated interstate system fully subject to our exclusive jurisdiction. Thus due to the current shortage of gas on United's system, deliveries to customers in these Divisions shall be subject to the curtailment provisions of United's tariff, pending the Commission's decision in the remanded proceedings, and all other matters, rate or otherwise, shall be subject to the Natural Gas Act and all rules, regulations, and orders issued thereunder.

74. We are aware that the finding of jurisdiction over the New Orleans and Lafayette Districts raises the question of the regulatory impact on the producers who have made sales both before and after the unauthorized commingling of gas occurred on these systems. We do not consider this question herein. To assure equitable treatment we will permit those producers selling directly to facilities herein declared jurisdictional to file their contracts pursuant to Paragraph 12 of Docket No. R-389A for consideration by this Commission without prejudice to their right to challenge this opinion on appeal and without admitting that this Commission has jurisdiction over the sales in question.

75. In *Louisiana Power & Light Co.* v. *United Gas Pipe Line Co.*, Fifth Circuit No. 71-2550, decided Jan. 14, 1972, ... F.2d ....., the court held that "* * * The regulation of

the Green system is substantially and essentially a localized matter committed to Louisiana's jurisdiction" (Slip Op., p. 29). Since we respectfully disagree with the legal conclusion drawn by the court, we are constrained to consider the question of whether this Commission is precluded from making an independent decision based upon the record in the case before us.

76. We have examined the basic authorities on *res judicata* and estoppel by judgment and fail to find any authority for the proposition that an administrative agency charged by Congress to determine its jurisdiction in accordance with the Administrative Procedure Act and the Natural Gas Act must terminate its proceedings when a court, in a collateral suit, reaches the jurisdictional question. See *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41 (1938).

77. We have considered such cases as *Commissioner* v. *Sunnen*, 233 U.S. 598 (1948), wherein the Supreme Court held the doctrine of estoppel inapplicable to subsequent relitigation by an agency of the same question decided adversely to it in court.

78. In *Otis & Co.* v. *S. E. C.*, 176 F.2d 34 (D.C. Cir. 1948), *rev'd per curiam*, 338 U.S. 843 (1949), SEC brought a suit in the District Court to require certain parties to testify in a concurrent administrative proceeding. Upon the court ruling against SEC, Otis then sought injunctive relief to terminate the administrative hearings. The District Court dismissed the suit and the Court of Appeals reversed. The Supreme Court upheld the District Court dismissal, citing *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41 (1938), *supra*.

79. In *Federal Water and Gas Corp.*, 188 F.2d 100 (3rd Cir. 1951), the SEC approved a plan which was ultimately affirmed in the Supreme Court. On subsequent order, the

Court of Appeals attempted to modify the agency's order, but the Supreme Court prohibited this. This decision is not in point.

80. *Chicot County Drainage District* v. *Baxter State Bank,* 308 U.S. 371 (1940), has no application to this situation since there was no question of forum or primary jurisdiction. The same is true of *Stoll* v. *Gottlieb,* 305 U.S. 165 (1938).

81. In *U. S.* v. *Utah Construction and Mining Co.,* 384 U.S. 394 (1966), the Advisory Board of Contract Appeals held hearings in which the company asserted claims against the Atomic Energy Commission for additional compensation and time extension. Subsequent to the decision, the respondent brought suit for breach of contract in the Court of Claims which ruled that the factual issues in the controversy should be resolved in a judicial trial. The Supreme Court held that the Court of Claims could review the administrative record, but could not retry the issues, which had properly been before the agency and which the parties had an adequate opportunity to litigate. This case is instructive, since it reflects the deference to administrative proceedings which we have asserted.

82. In *City of Tacoma* v. *Taxpayers of Tacoma,* 357 U.S. 320 (1958), the Federal Power Commission issued a license to construct and operate a hydroelectric project. The City petitioned the Court of Appeals on the ground that the City could not act in opposition to a State policy. The Court of Appeals affirmed the Commission's order and the Supreme Court denied certiorari. In regard to the bond issue, the State court enjoined the City and Supreme Court of Washington affirmed. The U.S. Supreme Court in granting certiorari stated that the bond validation suit was an impermissible collateral attack upon the final judgment of the Court of Appeals in the initial proceeding. There, again, the administrative proceedings were held to be primary.

83. We conclude that we are not precluded from reaching a decision by the action of the court's opinion. The *LP&L* case is a collateral attack on the Commission's jurisdiction to hear and to decide the case presented in Docket No. CP71-89. Counsel for the Commission, authorized and directed to appear for the Commission as intervener in the collateral suit, asserted the primary jurisdiction of this Commission to decide the case; — the Commission did not — and could not — take a position on the merits until this decision was reached. Therefore, the instant decision is the first opportunity we have had to decide the issues entrusted to us by the Congress through the Natural Gas Act, subject to court review. We thus feel constrained to state for the review of any Court of Appeals and the Supreme Court, if certiorari be granted, the findings and conclusions of law in the order herein entered.

The Commission finds:

(1) Applicant, United Gas Pipe Line Company, a Delaware corporation having its principal place of business in Shreveport, Louisiana, is a "natural-gas company" within the meaning of the Natural Gas Act as heretofore found by the Commission in its order of January 20, 1942, in Docket No. G-216, 3 FPC 3.

(2) United has introduced significant quantities of interstate gas into its Lafayette and New Orleans facilities and has commingled uncertificated and interstate gas supplies since 1965.

(3) The Federal Power Commission has jurisdiction under the Natural Gas Act and particularly Sections 2(7) and 1(b) thereof over the facilities, transportation, and sales for resale of natural gas by United by means of and from its interstate facilities within United's Victoria and New Orleans Divisions in the States of Texas and Louisiana, respectively.

(4) United has failed to present sufficient evidence as required by the Commission's Regulations to permit the Commission to evaluate the factors entering into determining whether the certificate of public convenience and necessity requested by United should be issued or granted with conditions.

(5) The proceeding should be remanded to the Presiding Examiner in order to permit United to satisfy the evidentiary deficiencies which have hereinbefore been specified.

(6) United's sales and services within the Victoria and New Orleans Divisions should be continued on an emergency basis pending further order of the Commission in the remanded proceedings.

The Commission orders:

(A) The proceeding in Docket No. CP71-89 is hereby remanded to the Presiding Examiner for receipt of additional evidence to overcome the deficiencies hereinbefore specified.

(B) Within 45 days after issuance of this order United shall file with the Commission and serve upon the Presiding Examiner, all parties to the proceeding, and the Commission's staff the testimony and exhibits required to satisfy the evidentiary deficiencies hereinbefore specified.

(C) Within 30 days after the filing and service of United's evidence all other parties and the Commission's staff shall file with the Commission and serve upon the Presiding Examiner, United, and other participants any evidence which they may wish to present in support of their positions.

(D) Service to all customers in the Victoria and New Orleans Divisions shall be continued on an emergency basis, on condition that United's facilities therein be oper-

ated as part of its integrated interstate system, subject to curtailment under United's tariff and subject to the Natural Gas Act and all rules, regulations, and orders issued thereunder, pending the issuance of a final decision in this proceeding.

(E) The hearing in the remanded proceeding shall commence on April 25, 1972, at 10:00 a.m. (EST) in one of the Commission's hearing rooms, 441 G Street, N.W., Washington, D.C. 20426.

(F) The motions for oral argument made herein are denied.

By the Commission. Commissioner Carver dissenting filed a separate statement appended hereto.

[SEAL]

Kenneth F. Plumb,
Secretary

UNITED GAS PIPE LINE COMPANY) DOCKET NO. CP71-89

(Issued February 9, 1972)

CARVER, Commissioner, *dissenting:*

I dissent from so much of this opinion as relates to the New Orleans District (or Green System-East) portion of United's facilities in the State of Louisiana.

To understate the matter considerably, this is a most unusual case. The applicant is a major pipeline company, long recognized as a "natural gas company" for the purposes of regulation under the Natural Gas Act, and a party to numerous, probably hundreds, of proceedings before this Commission. For more than a decade, however, it has maintained a separate pipeline facility to serve customers in Louisiana on a strictly intrastate basis. Certification of this entity, or the purchases or sales made in connection with it, has been scrupulously avoided. No question of its jurisdictional status has been raised by the Commission staff, notwithstanding frequent audit, inspection, and review of company operations. In every way, United's Green System-East has been held out to customers and regulators alike as a local service unit free of Federal regulatory impact and free to contract in any manner it chose, consistent with State law.

Suddenly, in late 1970, United finds virtue in the privilege of being regulated and seeks to invoke our jurisdiction through this application. Why? United says *Florida Parishes* require such action. I disagree, but even if that were the case, Florida Parishes was finally concluded in 1966 and four years is a long time for error to surface in this fashion. Another explanation, less admirable but more plausible, lies in a combination of factual coincidences. United's Green System-East serves a heavy industrial load under long-term contracts reflecting the favorable rates

that prevailed when gas supplies were plentiful and pipeline capacity needed markets.[1] But between 1962 and 1970, the ratio of reserves to production for the supplies the Green System could rely upon dropped from an ample 30:1 to a dangerously low 4.6:1. Stated otherwise, at 1970 levels of delivery, United's available reserves could meet its customers' needs for less than five years. Hardly surprising, then, is the fact that within the same month that this application was filed, United also sought (and ultimately received) the assurance of this Commission that implementation of an approved curtailment plan "would be an absolute defense for United against all claims for specific performance, damages, or other requests for relief under these contracts." *United Gas Pipe Line Company*, ... FPC ..... (Opinion No. 606, October 5, 1971).

I did not participate in the above proceeding, but dissented to its reaffirmation on rehearing (Opinion No. 606-A, December 3, 1971), both generally and with specific reference to the above-quoted holding.[2] My reservations were well-founded, as evidenced by the present effort to use our jurisdiction as a shield against contracts which once appeared provident but now seem otherwise. Administrative bodies should not be insensitive to guiding principles of equity, and here there is a glaring lack of clean hands. The majority opinion concedes as much (see par. 51, *supra*).

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[1] Based on data in United's 1970 Annual Report and Exhibit 34 of the record, direct industrial sales represent nearly 68% of the volumes delivered by the New Orleans District (138.4 out of 203.7 million Mcf).

[2] The powers of this Commission are parallel in all essential respects to those conferred upon the FCC by the Communications Act of 1934 (47 U.S.C. 301ff), as to which the Supreme Court has said: ". . . We do not read the Communications Act to give authority to the Commission to determine the validity of contracts between licensees and others." *Regents of the University System of Georgia* v. *Carroll, et al.* (1950) 338 U.S. 586, 600-602.

The preceding observations are merely descriptive of the general setting and the dominant motivations that surround the proceeding. It is necessary to state them here because they are not otherwise exposed to public view. They explain in considerable part my refusal to join in what the Commission does today, but they are buttressed by a broad array of more specific objections I have to the majority opinion. Ordinarily, I should feel compelled to document those legal, policy, and procedural differences in the detail they merit. I refrain from doing so, however, because the issues involved have passed from this arena. What is done here is a useless thing and one that portends difficulty for this Commission in the future.

While this proceeding was pending, some of the parties engaged in a race to the courthouse with this Commission in hot pursuit. *Louisiana Power and Light* v. *United Gas Pipe Line Company,* cited par. 75, majority opinion *supra,* constitutes a full adjudication by a court of competent jurisdiction of the very issues here considered. Until that judgment is vacated through available appellate resort, this Commission is without authority to issue any valid directive inconsistent therewith.

Whether we denominate the principle involved as *res judicata,* estoppel by judgment, or some other term, every lesson of the law tells us that we are bound by the opinion of the Fifth Circuit Court of Appeals unless and until its judgment is vacated through proper judicial process. The conditions for application of that principle could not be more clearly present. The issues are identical; the essential parties are the same. This proceeding merely renews a duel that has already been "fought out . . . in litigation with the other party." *Commissioner* v. *Sunnen,* 333 U.S. 598 (1948). (This case is not the same as *FPC* v. *Amerada Petroleum Corp., et al.,* 379 U.S. 687 (1965), because it

was there admitted by the court below that a new claim was being litigated in the second action. By contrast, the order being issued here is in head-on collision with the Fifth Circuit's holding on the status of United's Green System-East.)

This conclusion is the more compelling because of the special facts surrounding the earlier judicial proceeding. As the majority account amply discloses, this Commission was not an original party thereto, but chose voluntarily to intervene for the purpose of arguing its primary jurisdiction.[3] Knowingly and purposefully, it submitted to the jurisdiction of the courts which have so far considered the matter. "An administrative body which submits a legal question to a court of competent jurisdiction is bound by its judgment," *Otis & Co.* v. *SEC*, 176 F.2d 34 (CADC, 1948) (holding as summarized in Headnote 4), and may be enjoined from undertaking a subsequent proceeding to relitigate the same controversy. An attack on a prior judgment will also be rejected, "even though it was based on a patently erroneous view of the law." *In re Federal Water and Gas Corp.*, 188 F.2d 100, 105 (CA3, 1951), cert. den. *sub. nom. Chenery Corp. et al.* v. *SEC*, 341 U.S. 953 (1951).

Res judicata concepts are controlling as to jurisdictional questions as well as factual matters bearing on the merits, *Stoll* v. *Gottlieb*, 305 U.S. 165, 172 (1938), and enforces

[3] In this respect, the majority opinion fails to make the proper distinction between the parallel and equal doctrines of primary jurisdiction on the one hand and *res judicata* on the other (par. 83). Primary jurisdiction does not constitute an *ouster of power* to hear a case; it merely provides a working formula to establish *priority of consideration* where substantive issues in the proceeding are within the expert competence of the agency. *Res judicata* is an effective bar to rehearing of an issue already litigated. As presented here, the ultimate distinction is between an alleged *collateral* attack upon administrative jurisdiction and a *direct* attack upon a judgment already rendered.

repose "not only as respects matters actually presented . . . in the original proceeding, but also as respects any other available matters which might have been presented to that end" (Citations omitted), *Chicot County Drainage District* v. *Baxter State Bank, et al.*, 308 U.S. 371, 378 (1940).

Administrative proceedings are subject to the same principles as judicial bodies in this respect, and there is no doubt but what the courts would have protected our process had the issues herein been decided initially by this Commission and allowed to become final, *U.S.* v. *Utah Construction and Mining Co.*, 384 U.S. 394, 422 (1966); nor will the state courts be permitted to retry issues previously determined by the Commission acting within its proper scope of authority. *City of Tacoma* v. *Taxpayers of Tacoma*, 357 U.S. 320, 339 (1958).

This is a sword that must be allowed to cut both ways if administrative and judicial authority are to respond in the complementary and concurrent manner that our complex society requires. By our intervention in a private lawsuit, we have already lent the weight of sovereign Federal authority to one side of the balance. Having failed to carry that forum, it is proposed to flout the court's mandate, an action which is as fruitless as it is irresponsible.

/s/ JOHN A. CARVER, JR.,
John A. Carver, Jr.,
Commissioner

NO. 71-1016

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

FEDERAL POWER COMMISSION,
Petitioner,

v.

LOUISIANA POWER & LIGHT COMPANY, *et al.*
(The Collateral Proceeding)

FEDERAL POWER COMMISSION,
Petitioner,

v.

LOUISIANA POWER & LIGHT COMPANY, *et al.*
(The Curtailment Proceeding)

MEMORANDUM OF THE PUBLIC SERVICE COMMISSION FOR THE STATE OF NEW YORK IN SUPPORT OF MOTION FOR EXPEDITED CONSIDERATION AND PETITIONS FOR WRITS OF CERTIORARI

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The Public Service Commission for the State of New York (New York), an intervenor before both the Federal Power Commission and in the Fifth Circuit Court of Appeals in the so-called "curtailment proceeding,"[1] strongly supports the Motion for Expedited Consideration and Petitions for

[1] The lead case in the Fifth Circuit seeking review of the Federal Power Commission's opinions in the curtailment proceeding is *Louisiana Power & Light Co., and New Orleans Public Service, Inc. v. Fed-*

Writs of Certiorari which have been filed in these proceedings by the Solicitor General on behalf of the Federal Power Commission. In New York's view only prompt action by this honorable Court can permit the Federal Power Commission to proceed with urgently needed action on a number of curtailment proceedings now pending before the Commission.

NEW YORK'S INTEREST

The Public Service Commission for the State of New York is a regulatory body established under the laws of that state to insure, *inter alia*, that New York citizens receive adequate supplies of natural gas at the lowest prices consistent with the healthy growth of the gas distribution industry. See *McKinney's Consolidated Laws of New York*, Vol. 47. Virtually all of the natural gas consumed in New York State originates in other states, in large part from Southern Louisiana and the Texas Gulf Coast, and from the continental shelf offshore the states of Louisiana and Texas in the Gulf of Mexico. From these and other areas it is then transported into New York by a number of interstate pipelines which are subject to the rate and service jurisdiction of the Federal Power Commission, some of whom in turn purchase major portions of their gas from other pipelines. As a result of this situation the Public Service Commission has found it necessary, in order to protect the interests of gas consumers in its state, to intervene and participate actively in proceedings before the Federal Power Commission relating to the pipelines serving New York and their suppliers. See, *e.g.*, *Atlantic Refining Co. v. Public Service Commission for the State of New York (CATCO* case*)*, 360 U.S. 378 (1959).

Of the six interstate pipelines presently providing gas to New York distribution companies, five, Transcontinental Gas Pipeline Corporation, Texas Eastern Transmission Com-

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eral Power Commission, Case No. 71-3429. New York's petition to intervene in that case was granted by order of Judge Coleman on January 11, 1972.

pany, Algonquin Gas Transmission Company, Consolidated Gas Supply Corporation, and Columbia Gas Transmission Company, presently have curtailment proceedings pending before the Federal Power Commission and two of these, both of which account for major amounts of gas consumed in New York, have actually found it necessary to curtail firm service to the customers in New York and other states for extended periods during the present winter heating season. In addition, curtailment proceedings are pending involving a number of other pipelines who sell large amounts of gas to the pipelines serving New York. Predominant among these other pipelines is the United Gas Pipe Line Company, the pipeline involved in the present cases, which is a major supplier of gas to Texas Eastern and Texas Gas Transmission Corporation, and through them to Consolidated Gas Supply, and Algonquin Gas Transmission. It is New York's understanding that the firm service curtailment which Texas Eastern has had to impose during the present winter heating season is the direct outgrowth of the curtailment in turn imposed on it by United Gas Pipe Line. It was for this reason, among others, that New York intervened and participated in the United curtailment proceeding before the Commission, and has intervened in the several petitions for review of the Commission's Opinion No. 606 therein which have been filed in the Fifth Circuit.[2]

ARGUMENT

It is of the utmost importance to gas consumers in the State of New York for this Court, at the earliest possible time, to pass upon the validity of the decision of the court

[2] While most of the pipelines serving New York make some direct sales (though none within New York), this is a relatively unimportant aspect of their business. However, major pipeline suppliers of the pipelines serving New York, including preeminently United, make extensive direct sales. The issue posed by the present petitions thus has an important bearing on the total amount of natural gas available to New York consumers.